

No. 91-790-CFX
Status: GRANTED

Title: CSX Transportation, Inc., Petitioner
v.
Lizzie Beatrice Easterwood

Docketed:
November 15, 1991

Court: United States Court of Appeals for
the Eleventh Circuit

Vide:
91-1206

Counsel for petitioner: Senterfitt, Jack H., Phillips, Carter
G.

Counsel for respondent: Colston, Tandra Pannell,
Shields, Robert E.

Entry	Date	Note	Proceedings and Orders
1	Nov 15 1991	G	Petition for writ of certiorari filed.
2	Dec 18 1991		DISTRIBUTED. January 10, 1992
4	Dec 18 1991	G	Motion of Association of American Railroads for leave to file a brief as amicus curiae in No. 91-790 filed.
3	Jan 7 1992	P	Response requested. (Due February 7, 1992)
5	Jan 24 1992		Brief of respondent Lizzie Easterwood in opposition filed.
6	Feb 26 1992		REDISTRIBUTED. March 20, 1992
7	Feb 27 1992	X	Reply brief of petitioner CSX Transportation, Inc. filed.
8	Mar 12 1992	X	Supplemental brief of petitioner CSX Transportation filed. VIDED.
9	Mar 23 1992	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
10	Jun 8 1992		Brief amicus curiae of United States filed. VIDED.
11	Jun 10 1992		REDISTRIBUTED. June 26, 1992
12	Jun 10 1992	X	Reply brief of petitioner CSX Trans., Inc. filed. VIDED.
13	Jun 29 1992		Motion of Association of American Railroads for leave to file a brief as amicus curiae in No. 91-790 GRANTED.
14	Jun 29 1992		Petition GRANTED. *****
15	Jul 23 1992		Record filed.
		*	Original proceedings United States District Court, Northern District of Georgia (1 Box)
16	Jul 24 1992		Record filed.
		*	Partial proceedings United States Court of Appeals for the Eleventh Circuit.
18	Aug 6 1992		Order extending time to file brief of petitioner on the merits until August 27, 1992.
19	Aug 27 1992		Joint appendix filed. VIDED.
20	Aug 27 1992		Brief of petitioner CSX Transportation filed. VIDED.
21	Aug 27 1992		Brief amicus curiae of National Railroad Passenger Corp. - filed. VIDED.
22	Aug 27 1992		Brief amicus curiae of Association of American Railroads filed. VIDED.
23	Aug 27 1992		Brief amici curiae of Texas Class I Railroads filed. VIDED.
24	Aug 27 1992		Brief amicus curiae of United States filed. VIDED.
27	Sep 11 1992		Order extending time to file brief of respondent on the merits until October 13, 1992.
25	Sep 15 1992	G	Motion of respondent /cross-petitioner to permit Tandra Pannell Colston, Esq., to present oral argument pro hac vice filed.

Entry	Date	Note	Proceedings and Orders
29	Sep 15 1992	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
31	Sep 28 1992		Brief amicus curiae of Railway Labor Executives' Association filed. VIDE.
28	Oct 5 1992		Motion of respondent /cross-petitioner to permit Tandra Pannell Colston, Esq., to present oral argument pro hac vice GRANTED.
30	Oct 5 1992		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. Justice Blackmun would deny this motion.
32	Oct 8 1992	G	Motion of the Solicitor General to permit William K. Kelley, Esquire, to present oral argument pro hac vice filed.
36	Oct 8 1992		Brief amicus curiae of American Automobile Association filed. VIDE.
33	Oct 13 1992		Motion of the Solicitor General to permit William K. Kelley, Esquire, to present oral argument pro hac vice GRANTED.
34	Oct 13 1992		Brief amici curiae of American Trucking Association, Inc., et al. filed. VIDE.
35	Oct 13 1992		Brief amici curiae of National Conference of State Legislatures, et al. filed. VIDE.
37	Oct 13 1992		Brief of respondent Lizzie Easterwood filed. VIDE.
38	Oct 13 1992		Brief amici curiae of Association of Trial Lawyers of America, et al. filed. VIDE.
39	Oct 13 1992		LODGING consisting of two documents received from amici curiae, Assn. of Trial Lawyers of America.
40	Oct 13 1992		Brief amicus curiae of Cynthia Wilson Pryor filed.
41	Oct 13 1992		Brief amici curiae of Ohio, et al. filed. VIDE.
42	Nov 2 1992	G	Application (A92-367) by Petitioner and Cross-Respondent to file a reply brief in excess of page limits, submitted to Justice Kennedy.
43	Nov 4 1992		Application (A92-367) granted by Justice Kennedy, allowing a maximum of 25 pages.
44	Nov 12 1992		LODGING consisting of one book, (Manual on Uniform Traffic Control Devices) received from the respondent/cross petitioner.
45	Nov 16 1992		Reply brief of petitioner filed. VIDE.
46	Nov 20 1992		SET FOR ARGUMENT TUESDAY JANUARY 12, 1993 (1ST CASE).
47	Nov 23 1992		CIRCULATED.
48	Jan 12 1993		ARGUED.

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OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

CSX TRANSPORTATION, INC.,
Petitioner,

v.

LIZZIE BEATRICE EASTERWOOD,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

JACK H. SENTERFITT
Counsel of Record

RICHARD T. FULTON
JAMES W. HAGAN
ALSTON & BIRD
1201 West Peachtree Street, N.W.
Atlanta, Georgia 30309-3424
(404) 881-7000
Counsel for Petitioner

November 15, 1991

Lex Publishing Company, 2161 Monroe Dr., Atlanta, Georgia 30324 (404) 875-5140

QUESTIONS PRESENTED

1. Whether Section 205 of the Federal Railroad Safety Act, 45 U.S.C. 434, preempts application of a state tort law duty on railroads to select and install traffic-control devices at grade crossings when federal law and regulations specify that (1) public authorities, not railroads, have this responsibility, and (2) state regulation of this subject matter of railroad safety is expressly preempted.

2. Whether the fact that federal grade crossing regulations were promulgated under the authority of both the Federal Railroad Safety Act and federal highway legislation affects the express preemption mandated by Section 205 of the Federal Railroad Safety Act, 45 U.S.C. 434.

LIST OF PARTIES

Parties

CSX Transportation, Inc.

Lizzie Beatrice Easterwood

Parent Corporations

CSX Corporation

Attorneys

Jack H. Senterfitt

Richard T. Fulton

James W. Hagan

William Lundy

James Parker

Tambra Colston

Robert E. Shields

*Organizations*Georgia Trial Lawyers Association (*amicus curiae* in
the Eleventh Circuit)

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.....	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION.....	2
CONSTITUTIONAL PROVISION AND STATUTES INVOLVED.....	2
STATEMENT OF THE CASE	3
A. Procedural Background.....	3
B. Statement of Facts.....	4
REASONS FOR GRANTING THE WRIT.....	5
I. THE PANEL'S DECISION UNDERMINES A UNIFORM FEDERAL SCHEME TO IMPROVE GRADE CROSSING SAFETY	5
II. THE DECISION BELOW CONFLICTS WITH EXPLICIT STATUTORY AUTHORITY.....	9
A. The FRSA's Language and Legislative History Evidence a Clear Congressional Intent to Eliminate State Regulation of Crossing Safety	10
B. The Secretary's Decision to Regulate the Duty to Select Crossing Protection Ex- pressly Preempts State Tort Law Regulation of the Same Subject Matter....	13

1. Federal legislation allocates to public authorities the duty to evaluate the need for traffic-control devices at grade crossings.....	13
2. Federal regulations require public authorities to select traffic-control devices at crossings.....	14
III. THE DECISION BELOW CREATES A CONFLICT IN THE CIRCUITS.....	16
A. The Decision Below Conflicts With the Ninth Circuit's Interpretation of the FRSA and the Decisions of Numerous Federal and State Courts.....	16
B. The Decision Below Creates a Conflict in the Circuits on the Secretary's Statutory Authority to Regulate Rail Safety.....	18
1. The Secretary regulated crossing safety under authority of the FRSA	19
2. Even if the Secretary had regulated <i>solely</i> under authority of federal highway laws, Section 434 expressly preempts Plaintiff's claims	20
3. As the Fifth and Sixth Circuits have held, Section 434 preempts state regulation regardless of the secretary's regulatory authority.....	21
CONCLUSION.....	24

APPENDIX A	
Opinion and Judgment of the Court of Appeals.....	1a
APPENDIX B	
Order of the District Court on Petitioner's Motion for Summary Judgment.....	23a
APPENDIX C	
Judgment of Court of Appeals denying Motion for Rehearing and Suggestion for Rehearing En Banc.....	29a

TABLE OF AUTHORITIES

CASES	Page
<i>Armijo v. Atchison, T. & S.F. Ry. Co.</i> , 754 F. Supp. 1526 (D.N.M. 1990)	10, 16, 17
<i>Atchison, T. & S.F. Ry. v. Illinois Comm. Comm'n.</i> , 453 F. Supp. 920 (N.D. Ill. 1977)	21
<i>Barger v. Chesapeake Ohio Ry. Co.</i> , No. 90AP-402 (Ohio App. Nov. 15, 1990)	16
<i>City of Covington Ky. v. Chesapeake & Ohio Ry Co.</i> , 708 F. Supp. 806 (E.D. Ky. 1989)	9, 12
<i>Conner v. Missouri Pac. R.R.</i> , No. 90-C-562-E (N.D. Okla. March 14, 1991)	16
<i>Consolidated Rail Corp. v. Smith</i> , 664 F. Supp. 1228 (N.D. Ind. 1987)	8, 12
<i>CSX Transp., Inc. v. Public Utils. Comm'n of Ohio</i> , 701 F. Supp. 608 (S.D. Ohio 1988), <i>aff'd</i> 901 F.2d 497 (6th Cir. 1990), <i>cert. den.</i> 111 S.Ct. 781 (1991) ("P.U.C.O")	11, 12, 22
<i>CSX Transp., Inc. v. City of Tullahoma</i> , 705 F. Supp. 385 (E.D. Tenn. 1988)	22
<i>CSX Transp., Inc. v. City of Thorsby, Ala.</i> , 741 F. Supp. 889 (M.D. Ala. 1990)	12
<i>Donelon v. New Orleans Terminal Co.</i> , 474 F.2d 1108 (5th Cir.), <i>cert. den.</i> , 414 U.S. 855 (1973)	12
<i>Easterwood v. CSX Transp., Inc.</i> , 742 F. Supp. 676 (N.D. Ga. 1990)	3, 4
<i>Easterwood v. CSX Transp., Inc.</i> , 933 F.2d 1548 (11th Cir. 1991)	4, 9, <i>passim</i>

<i>English v. General Elec. Co.</i> , 110 S.Ct. 2270 (1990)	10
<i>Karl v. Burlington N. R.R. Co.</i> , 880 F.2d 68 (8th Cir. 1989)	16
<i>Mahony v. CSX Transp., Inc.</i> , No. 4:88-CV-13-HLM (N.D. Ga. Feb. 6, Apr. 16, 1990)	16
<i>Marshall v. Burlington N., Inc.</i> , 720 F.2d 1149 (9th Cir. 1983)	16
<i>Missouri Pac. R.R. v. Railroad Comm'n of Texas</i> , 671 F. Supp. 466 (W.D. Tex. 1987), <i>aff'd</i> 850 F.2d 264 (5th Cir. 1988), <i>cert. den.</i> 488 U.S. 1009 (1989) ("MOPAC II")	12, 21
<i>National Ass'n. of Regulatory Utils. Comm'rs. v. Coleman</i> , 542 F.2d 11 (3d Cir. 1976)	12
<i>Nixon v. Burlington N. R.R. Co.</i> , No. CV85-384-BLG (1988 U.S. Dist. Lexis 16477) (D. Mont. Apr. 2, 1988)	16
<i>Norfolk & W. Ry. v. Public Utils. Comm'n of Ohio</i> , 926 F.2d 567 (6th Cir. 1991)	12
<i>Rayner v. Smirl</i> , 873 F.2d 60 (4th Cir.), <i>cert. den.</i> 110 S.Ct. 213 (1989)	9, 12
<i>San Diego Bldg. Trades Council v. Garmon</i> , 359 U.S. 236 (1959)	13
<i>Sisk v. National R.R. Passenger Corp.</i> , 647 F. Supp. 861 (D. Kan. 1986)	8, 16
<i>Smith v. Norfolk & S. Ry. Co.</i> , No. 590-494 (N.D. Ind. Oct. 8, 1991)	16

STATUTES AND REGULATIONS:

Federal Acts and Statutes:

23 U.S.C. §109(e).....	14
23 U.S.C. §120(d).....	14
23 U.S.C. §130.....	14
23 U.S.C. §130(d).....	13, 14
23 U.S.C. §315.....	14
23 U.S.C. §402.....	14
28 U.S.C. §1254(1).....	2
28 U.S.C. §1332.....	3
45 U.S.C. §421.....	6
45 U.S.C. §431(a).....	10, 20
45 U.S.C. §433(a).....	20
45 U.S.C. §433(b).....	6, 18, 19, 20
45 U.S.C. §434.....	4, 8, <i>passim</i>
49 U.S.C.A. §102-104 (1991 Sp. Pamphlet).....	18
Federal-Aid Highway Act of 1973, Pub. L. No. 93-87, 87 Stat. 250.....	13
Federal Railroad Safety Act of 1970, Pub. L. No. 91- 458, 84 Stat. 971.....	4, 6, <i>passim</i>
Surface Transportation Assistance Act of 1978, Pub. L. No. 95-599, 92 Stat. 2689.....	14
Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, 101 Stat. 32 (1987).....	14

Federal Regulations:

23 C.F.R. Part 646.....	7, 14, 19
23 C.F.R. §646.200.....	14, 19
23 C.F.R. §646.210(b)(1).....	8
23 C.F.R. §646.214.....	15
23 C.F.R. Part 655.....	7, 14, 19
23 C.F.R. §655.601.....	15
23 C.F.R. §655.603.....	14

23 C.F.R. §655.603(a).....	15
23 C.F.R. Part 924.....	7, 14, 19
23 C.F.R. §924.7 thru 924.11.....	14, 15
23 C.F.R. Part 1204.....	7, 14, 19
23 C.F.R. §1204.4 (Guideline No. 13, ¶1.D.5).....	14
49 C.F.R. §1.48.....	18, 19
49 C.F.R. §1.48(o).....	19
49 C.F.R. §1.49.....	18
Manual on Uniform Traffic Control Devices (rev'd. ed. 1988)("MUTCD") (adopted in 23 C.F.R. §655.603(a)).....	15

OTHER AUTHORITIES:

H.R. Rep. No. 1194, 91st Cong., 2d Sess., <i>reprinted</i> <i>in</i> 1970 U.S. Code Cong. & Admin. News 4104.....	10, 11, 12, 13, 21
<i>Hearings Before the House Subcommittee on</i> <i>Transportation and Aeronautics, 91st Cong.,</i> <i>2d Sess. (May 17-23, 1970)(remarks of Reps.</i> <i>Springer and Kuykendall).....</i>	11
Brief of the United States as Amicus Curiae to the Supreme Court in <i>CSX Transp., Inc. v.</i> <i>Public Util's Comm'n of Ohio</i> , No. 90-95 (October Term, 1990).....	22, 23
United States Department of Transportation, <i>The</i> <i>1991 Annual Report on Highway Safety Im-</i> <i>provement Programs by the Secretary of</i> <i>Transportation to Congress</i> , (Apr. 1991).....	6
United States Department of Transportation, <i>Re-</i> <i>port to Congress: Railroad-Highway Safety,</i> <i>Part II: Recommendation for Resolving the</i> <i>Problem</i> , (Aug. 1972).....	7

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IN THE

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OCTOBER TERM, 1991

CSX TRANSPORTATION, INC.,
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LIZZIE BEATRICE EASTERWOOD,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

Petitioner CSX Transportation, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above-entitled proceeding on June 20, 1991.

OPINIONS BELOW

The Opinion of the Eleventh Circuit Court of Appeals is reported at 933 F.2d 1548, reprinted in the Appendix hereto, la-22a, *infra*. The Opinion of the United States District Court for the Northern District of Georgia is reported at 742 F. Supp. 676, reprinted in the Appendix hereto, 23a-28a, *infra*.

JURISDICTION

On June 20, 1991, a panel of the Eleventh Circuit Court of Appeals affirmed in part and reversed in part the grant of Petitioner's Motion for Summary Judgment by the United States District Court for the Northern District of Georgia. The Court of Appeals denied Petitioner's Motion for Rehearing and Suggestion for Rehearing *En Banc* on August 20, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The United States Constitution states in Article VI, Clause 2:

This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land;

Section 101 of the Federal Railroad Safety Act, 45 U.S.C. § 421, provides:

The Congress declares that the purpose of this chapter is to promote safety in all areas of railroad operations and to reduce railroad-related accidents. . . .

Section 202 of the Federal Railroad Safety Act, 45 U.S.C. § 431, provides:

The Secretary of Transportation . . . shall prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety. . . .

Section 204(b) of the Federal Railroad Safety Act, 45 U.S.C. 433(b) provides:

In addition the Secretary shall, insofar as practicable, under the authority provided by this subchapter and pursuant to his authority over

highway, traffic, and motor vehicle safety, and highway construction, undertake a coordinated effort toward the objective of developing and implementing solutions to the grade crossing problem. . . .

Section 205 of the Federal Railroad Safety Act, 45 U.S.C. § 434, provides:

The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. . . .

STATEMENT OF THE CASE

A. *Procedural Background.*

The issue presented in this Petition arises from a fatal grade crossing accident which occurred when Respondent's husband, Thomas Easterwood, drove into the path of Petitioner's train at the Cook Street railroad crossing in the City of Cartersville, Georgia.

Invoking diversity of citizenship jurisdiction under 28 U.S.C. § 1332, Respondent filed a wrongful death action against Petitioner CSX Transportation, Inc. (hereinafter "CSXT") alleging, insofar as pertinent to this petition, negligence in CSXT's failure to install automatic gate-arms in addition to other active warning devices at the crossing. (R3-24). CSXT timely moved for summary judgment on this and all other claims, which the District Court granted in a published opinion dated August 9, 1990. *See Easterwood v. CSX Transp., Inc.*, 742 F. Supp. 676 (N.D.Ga. 1990).

The District Court held that Section 205 of the Federal Railroad Safety Act (45 U.S.C. § 434) (hereinafter referenced as "Section 434") preempted Respondent's negligence claim regarding the adequacy of the traffic-control devices at this crossing. The Court determined that the Federal Railroad Safety Act (hereinafter "FRSA") preempts state law control of any rail safety subject matter addressed in federal regulations issued by the Secretary of Transportation (hereinafter "the Secretary"). Accordingly, Respondent's negligence claim was expressly preempted since the Secretary has addressed this precise subject matter in federal regulations specifying that public authorities have the exclusive duty to select appropriate traffic-control devices at railroad crossings. *Easterwood*, 742 F. Supp. at 677-78.

On June 20, 1991, a panel of the Eleventh Circuit affirmed in part and reversed in part the District Court's grant of summary judgment. The panel agreed that the FRSA expressly preempts tort claims relating to any rail safety subject matter addressed by federal regulations. While the panel acknowledged that the Secretary has regulated the subject matter of Respondent's claim regarding crossing warning devices, it concluded that this claim was not preempted since federal grade crossing regulations were issued--in the panel's erroneous view--solely under the Secretary's authority pursuant to various highway acts, not the expressly preemptive FRSA. See *Easterwood v. CSX Transp., Inc.*, 933 F.2d 1548, 1555-58 (11th Cir. 1991). On August 20, 1991, the Court denied CSXT's Motion for Rehearing and Suggestion for Rehearing *En Banc*. (See Appendix-C at 29a, *infra*).

B. Statement of Facts.

The train-vehicle collision at issue occurred at a grade crossing equipped with passive and active warnings, including three separate sets of dual, automatic red-flashing lights. Two lights were located on a signal mast next to Cook Street, two additional lights were positioned

directly over the center of Cook Street, and two further lights faced Mr. Easterwood from a separate signal mast. The crossing was also marked by two crossbuck signs, an advance railroad warning sign, and a large "RxR" pavement marking.

These traffic-control devices were upgraded several years before the incident pursuant to a federally-mandated grade crossing safety evaluation conducted by the Georgia Department of Transportation (hereinafter "GDOT"). (Affidavit of Wendall Hester, Manager of the GDOT Rail-Highway Grade Crossing Section, ¶4). Pursuant to federal regulations, the GDOT evaluated this and other Cartersville grade crossings and ordered the installation of automatic gate-arms at four adjacent crossings. While the GDOT initially recommended gate-arms at Cook Street, the City objected to GDOT's recommendation because the installation of gate-arms required the construction of traffic-islands which would inhibit tractor-trailer movement at nearby vehicular intersections. (*Id.* at ¶6). The GDOT ultimately decided *not* to add gate-arms to the warning equipment at Cook Street but instead upgraded the crossing's electronic train detection devices. (*Id.* at ¶¶ 5, 7). The GDOT evaluated the crossing and implemented these safety improvements explicitly pursuant to federal grade crossing regulations. (*Id.* at ¶¶ 5, 7).

REASONS FOR GRANTING THE WRIT

L

THE PANEL'S DECISION UNDERMINES A UNIFORM FEDERAL SCHEME TO IMPROVE GRADE CROSSING SAFETY.

The decision below, premised on a glaring error as to the statutory authority for federal grade crossing regulations, threatens a nationally uniform regulatory structure that has systematically improved crossing safety on a national level. This decision sanctions the same *ad*

hoc, dual system of federal-state rail safety regulation that Congress explicitly sought to eliminate through the FRSA. At stake is the vitality of a regulatory approach to crossing safety, preemptive of state regulation by express congressional design, that directly affects the safe operation and economic viability of the nation's railroads.

Since 1974, the federal government has spent more than two billion dollars under this regulatory structure to implement safety improvements at more than 25,000 railroad crossings nationally. United States Department of Transportation, *The 1991 Annual Report on Highway Safety Improvement Programs by the Secretary of Transportation to Congress*, at S-2 (Apr. 1991). The Secretary recently characterized this regulatory program as the most effective traffic-safety improvement effort ever undertaken, reducing fatal accidents at grade crossings by an astonishing 88 percent, nonfatal injuries by 62 percent, and preventing "over 6400 fatalities and 26,500 non-fatal injuries since 1974"--even though traffic volume increased dramatically during this same period. *Id.* at IV-5.

Congress established this regulatory approach to grade crossing safety shortly after it enacted the FRSA. See Pub. L. No. 91-458, 84 Stat. 971, codified as amended at 45 U.S.C.A. §§ 421-444 (1986). As a precursor to actual regulation, the FRSA required the Secretary to study all railroad safety issues, specifically including "the problem of eliminating and protecting railroad grade crossings." 45 U.S.C. § 433(a). The FRSA also charged the Secretary to implement solutions to the grade crossing problem "under the authority provided by [the FRSA] and pursuant to [the Secretary's] authority over highway, traffic, and motor vehicle safety." 45 U.S.C. § 433(b) (emphasis added). In response, the Secretary published a study in 1972 criticizing dual federal-state regulation as inefficient and haphazard, thus requiring "national coordination" to promote safety:

[J]urisdiction over railroad-highway intersections resides exclusively in the States. Responsibility is frequently divided among several public agencies and the railroad. *The net effect results in a fragmented approach to grade crossing safety.* The need for national coordination of an issue that affects the Nation's railroad and highway systems is apparent.

United States Department of Transportation, *Report to Congress: Railroad-Highway Safety, Part II: Recommendations for Resolving the Problem*, at vii (Aug. 1972) (emphasis added). The Secretary also recognized the anomaly of placing responsibility for the selection of traffic-control devices on railroads:

The concept of dual responsibility for grade crossing protective devices . . . is unique. It is the only location along the highway where the highway authorities do not have total responsibility for and control over the installation, operation and maintenance of traffic control devices.

Id. at 33. The Secretary determined that public authorities should, for the first time, assume "additional responsibility with regard to grade crossing protective devices" and design traffic-control systems at crossings under uniform federal criteria with due regard for the functional characteristics of the roadway involved. *Id.*

As described below, the Secretary acted to improve grade crossing safety pursuant to the FRSA and his authority over highway safety. In 23 C.F.R. Parts 646, 655, 924 and 1204, the Secretary established a nationally uniform body of regulation explicitly specifying that public authorities, not railroads, have the exclusive duty to (1) evaluate grade crossings, (2) select appropriate traffic-control devices according to federal criteria, and (3) implement improvements. These regulations not only

assign to public authorities the exact duty which Respondent seeks to impose on CSXT, they expressly state that "[p]rojects for grade crossing improvements are deemed to be of no ascertainable net benefit to the railroads and there shall be no required railroad share of the costs." 23 C.F.R. 646.210(b)(1). Absent preemption, and under the decision below, the threat of tort law damages imposes on railroads the duty to create and fund private processes for the evaluation and selection of traffic-control devices at crossings despite federal law and regulation to the contrary.

In order to avoid this "fragmented" approach to crossing safety, the FRSA defines explicitly the preemptive scope of the Secretary's regulations. Simply put, once the Secretary regulates a rail safety subject matter, state regulation is expressly preempted. 45 U.S.C. § 434. Any other conclusion is contrary to explicit statutory authority and the FRSA's goal of national uniformity. As the District Court stated in oral argument, "[i]f you allow a common law action [against a railroad for failing to install gate-arms], then preemption is out the window." (Tr. at 38). Allowing juries to determine the adequacy of traffic-control devices completely contradicts the regulatory determination "that grade crossing improvements [are] a governmental responsibility rather the responsibility of the railroads. . . ." *Sisk v. National R.R. Passenger Corp.*, 647 F. Supp. 861, 863 (D. Kan. 1986). The Eleventh Circuit's failure to acknowledge the preemptive statutory authority for the Secretary's regulations creates a *de facto* state law regulatory scheme "completely at odds with the language of section 434, the structure of the FRSA as a whole, and Congressional purpose in adopting the statute." *Consolidated Rail Corp. v. Smith*, 664 F. Supp. 1228, 1237 (N.D. Ind. 1987). Indeed, regulation through a hodgepodge of different rules, regulations, or jury verdicts ostensibly designed to reduce hazards, "do not, in the larger picture, reduce hazards at all, but rather may create them." *City of*

Covington, Ky. v. Chesapeake & Ohio Ry. Co., 708 F.Supp. 806, 808 (E.D.Ky. 1989).

This Court's guidance is needed to resolve a growing conflict as to the preemptive force of the Secretary's regulations. Numerous federal and state courts have held that these regulations expressly preempt any state law duty on railroads to select and install traffic-control devices. The Ninth, Fifth and Sixth Circuits have also rendered decisions in conflict with the Eleventh Circuit's holding and analysis. Dozens of other courts now confront this issue in pending litigation. A failure to review the decision below not only jeopardizes an effective and uniform approach to a national problem, it subjects the nation's railroads to "an unpredictable medley of jury determinations, which Congress, in its quest for national uniformity under § 434, sought to avoid." *Rayner v. Smirl*, 873 F.2d 60, 66 (4th Cir.), cert. den. 110 S.Ct. 213 (1989).

II

THE DECISION BELOW CONFLICTS WITH EXPLICIT STATUTORY AUTHORITY

CSXT respectfully submits that the Eleventh Circuit correctly interpreted the FRSA's expressly preemptive scope in almost all material respects except the source of statutory authority for federal grade crossing regulations. The decision below correctly (1) construed the FRSA to preempt any state law claim relating to a rail safety subject matter addressed in federal regulations, (2) acknowledged that the Secretary's grade crossing regulations address Respondent's claim, but (3) *misconstrued* the statutory authority for these regulations. See *Easterwood*, 933 F.2d at 1552-55. Significantly, the panel agreed with each step of an express preemption analysis only to err as to the statutory authority for regulations which address and preempt Respondent's claim.

A. The FRSA'S Language and Legislative History Evidence a Clear Congressional Intent to Eliminate State Regulation of Crossing Safety.

The Eleventh Circuit acknowledged that the FRSA's legislative history plainly demonstrates Congress' intent to eliminate dual federal-state regulation:

The legislative history indicates that Congress was wary of the role of the states in rail safety. The House Report stated that "[t]he committee does not believe that safety in the Nation's railroads would be advanced sufficiently by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems." H.R. Rep. No. 1194, 91st Cong., 2d Sess., reprinted in 1970 U.S. Code Cong. & Admin. News 4104, 4109. The committee also noted that "where the federal government has authority, with respect to rail safety, it *preempts the field*." House Report at 4108 (emphasis added).

Easterwood, 933 F.2d at 1552. Congress' intent to preempt state regulation is established by the FRSA's language, its legislative history, and in case law interpreting its provisions.

First, Congress expressly defined the broadly preemptive intent of the Act by charging the Secretary to "prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety. . . ." 45 U.S.C. § 431(a) (emphasis added). Congress "'define[d] explicitly'" the FRSA's preemptive scope and expressed its intent to eliminate continuing state regulation of any aspect of rail safety addressed by the Secretary. *Armijo v. Atchison, T. & S.F. Ry. Co.*, 754 F. Supp. 1526, 1530 (D.N.M. 1990) (quoting *English v. General Elec. Co.*, 110 S.Ct. 2270, 2275 (1990)). Specifically, Congress declared in Section 434

that rail safety regulation should be nationally uniform and that state regulation should be proscribed:

The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be *nationally uniform* to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

45 U.S.C. § 434 (emphasis added). See *Easterwood*, 933 F.2d at 1553 n.3 (rejecting argument that Respondent's claim fell within "local safety hazards" exception to express preemption).

Second, the FRSA's legislative history demonstrates that "[t]he issue of federal preemption was vigorously debated, leaving a clear record of congressional intent for virtually complete federal preemption in the area of railroad safety laws." *CSX Transp., Inc. v. Public Utils. Comm'n of Ohio*, 701 F. Supp. 608, 613 (S.D. Ohio 1988), *aff'd*, 901 F.2d 497 (6th Cir. 1990), *cert. den.* 111 S.Ct. 781 (1991) ("*P.U.C.O.*"). Preemption was the "turning point" or central feature of the FRSA. *Hearings Before the House Subcommittee on Transportation and Aeronautics*, 91st Cong., 2d Sess. 43, 114 (May 23, 1970), (remarks of Reps. Springer and Kuykendall). Congress determined that the former dual federal-state approach inadequately promoted safety, see House Report at 4104, 4109, 4117, and recognized

the need for a uniform body of regulation applicable to a national transportation system:

[T]he railroad industry has very few local characteristics. Rather, . . . it has a truly interstate character calling for a uniform body of regulation and enforcement. . . . To subject a carrier to enforcement before a number of different State administrative and judicial systems in several areas of operation could well result in an undue burden on interstate commerce.

Id. at 4110-11.

Finally, numerous decisions have acknowledged the Act's expressly preemptive effect. The Third and Fourth Circuits have stated that FRSA Section 434 evinces a "total preemptive intent" by Congress over all areas of rail safety addressed by federal regulation. *National Ass'n of Regulatory Utils. Comm'rs v. Coleman*, 542 F.2d 11, 13 (3d Cir. 1976); *Rayner*, 873 F.2d at 65. See *Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108, 1112 (5th Cir.), *cert. den.* 414 U.S. 855 (1973) ("[FRSA] regulatory scheme has pre-empted the field of railroad safety").¹ Even the panel below recognized that Congress "explicitly stated that it intended to pre-empt all state regulations covering the same subject matter as the federal regulations."

¹ The following decisions state that Section 434 is "broadly preemptive," "totally" preemptive, or an "explicit preemption provision": *Norfolk & W. Ry. Co. v. Public Utils. Comm'n*, 926 F.2d 567, 570 (6th Cir. 1991); *CSX Transp., Inc. v. City of Thorsby, Ala.*, 741 F. Supp. 889 (M.D. Ala. 1990); *Covington*, 708 F. Supp. at 808; *P.U.C.O.*, 701 F. Supp. at 612-13; *Missouri Pac. R.R. v. Railroad Comm'n*, 671 F. Supp. 466, 471 (W.D. Tex. 1987), *aff'd* 850 F.2d 264 (5th Cir. 1988), *cert. den.* 488 U.S. 1009 (1989) ("MOPAC II"); *Consolidated Rail Corp. v. Smith*, 664 F. Supp. 1228, 1236 (N.D. Ind. 1987).

Easterwood, 933 F.2d at 1553 (emphasis added).² Because Congress realized that "[t]he motoring public is part of the safety problem at the grade crossing," *Easterwood*, 933 F.2d at 1553 (quoting House Report, Appendix F, at 4130), the FRSA effectuated a regulatory shift allocating to public authorities the exclusive responsibility to evaluate crossings and select appropriate traffic-control devices. The FRSA therefore bars a lay jury from superimposing its own determination on this issue.

B. The Secretary's Decision to Regulate the Duty to Select Crossing Protection Expressly Preempts State Tort Law Regulation of the Same Subject Matter.

Pursuant to the FRSA and federal highway acts, the Secretary has established a comprehensive regulatory scheme that defines the specific criteria for selecting, and the railroad's lack of responsibility for choosing, appropriate traffic-control at grade crossings.

1. Federal legislation allocates to public authorities the duty to evaluate the need for traffic-control devices at grade crossings.

After the Secretary's 1972 study recommended the shift of responsibility for crossing signalization from railroads to public authorities, Congress passed the Federal-Aid Highway Act of 1973, Pub. L. No. 93-87, 87 Stat. 250, and created a pervasive federal scheme to improve safety at the nation's grade crossings. Congress (1) required each state to maintain a survey of crossings to "identify those railroad crossings which may require separation, relocation, or protective devices. . .," *id.* at §203(a) (23 U.S.C. § 130(d)), (2) directed state authorities to

² Preemption applies regardless of whether state regulation takes the form of a statute, an ordinance, a facet of the state's common law, or an individual award of state tort law damages. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959). The *Easterwood* panel correctly rejected the argument that "tort law is somehow immune to pre-emption." *Easterwood*, 933 F.2d at 1552 n. 2.

"establish and implement a schedule of projects for this purpose. . .," *id.*, (3) earmarked nearly \$80,000,000 solely for the installation of crossing devices, (4) defined detailed methods for selecting crossing protection, and (5) required states to report annually to the Secretary on efforts to implement the federal regulatory scheme. Simply stated, the 1973 Act reflected the FRSA's mandate that crossing safety be addressed through nationally uniform regulations implemented by responsible state and local authorities. Since 1973, Congress has reaffirmed this preemptive scheme vesting in public authorities the exclusive duty to select traffic-control devices at crossings.³ See generally 23 U.S.C. §§ 109(e), 120(d), 130, 315 and 402.

2. Federal regulations require public authorities to select traffic-control devices at crossings.

The Secretary has issued a score of regulations under authority of both the FRSA and various highway acts for the installation of traffic-control devices at crossings. See 23 C.F.R. §§ 646.200, 655.603, 924.7 through 924.11 and §1204.4 (No. 13, ¶ I.D.5). See generally 23 C.F.R. Parts 646, 655, 924, and 1204. These regulations require each state to create a detailed highway safety improvement program that (1) collects accident, traffic, and highway data for all grade crossings, (2) evaluates "[t]he relative hazard of public railroad-highway grade crossings based on a hazard

³ The Surface Transportation Assistance Act of 1978, Pub. L. No. 95-599, 92 Stat. 2689, appropriated over \$440,000,000 to state transportation agencies to install automatic traffic-control devices, § 203(a), and expanded the program to include *all* crossings on "any public road," § 203(b) (emphasis added). The Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, 101 Stat. 32, reaffirmed this preemptive regulatory scheme and reenacted the priority-based implementation approach first contained in the 1973 Act. See 23 U.S.C. § 130(d). In October 1991, by a vote of 95 to 3, the United States Senate approved H.R. 2942, allocating \$16.8 billion for the Federal-Aid Highway Program (which funds the federal scheme for grade crossing improvements), thereby increasing funding by 16% over 1991 levels.

index formula," and (3) schedules improvement projects according to a priority-based index in 23 C.F.R. § 924.9. This complex federal scheme specifically designates that state and local authorities, not railroads, are responsible for carrying out the very tasks which Respondent seeks to impose on CSXT under state law.

Not only do these federal regulations constitute "action by the Secretary" on the "subject matter" of Respondent's claim, the Secretary has expressly stated that all crossing devices must comply with the Manual on Uniform Traffic Control Devices (rev'd. ed. 1988) (hereinafter "MUTCD"). See 23 C.F.R. §§ 646.214 (requiring uniform standards); 655.601 and .603(a) (adopting the MUTCD as the national standard). The MUTCD explicitly states that public authorities have the express duty to select appropriate traffic-control devices at crossings:

The determination of the need and selection of devices at a grade crossing is made by the public agency with jurisdictional authority. Subject to such determination and selection, the design, installation and operation shall be in accordance with the national standards contained herein.

MUTCD ¶ 8A-1 (emphasis added). See also *id.* at § 8D-1 (the "selection of traffic control devices at a grade crossing is determined by public agencies having jurisdictional responsibility at specific locations"). The opinion below contradicts this legislative and regulatory decision to vest the choice of appropriate traffic-control devices in state and local authorities rather than railroads.

III.

THE DECISION BELOW CREATES A CONFLICT
IN THE CIRCUITSA. *The Decision Below Conflicts With the Ninth Circuit's Interpretation of the FRSA and the Decisions of Numerous Federal and State Courts.*

Numerous state and federal courts, including the Ninth Circuit, have determined that federal regulations preempt a state law duty on railroads to install traffic-control devices under the penalty of damage awards. As Justice Kennedy stated, "the Secretary has delegated federal authority to regulate grade crossings to local agencies" whose determinations constitute federal decisions and have a preemptive effect. *Marshall v. Burlington N., Inc.*, 720 F.2d 1149, 1154 (9th Cir. 1983). That is, "Congress determined that grade crossing improvements [are] a governmental responsibility rather than the responsibility of the railroads. . . ." *Sisk*, 647 F. Supp. at 863 (emphasis added). As another federal court recently determined, "federal grade crossing regulations preempt state law claims against railroads predicated upon negligence in selecting or providing additional warning devices." *Armijo*, 754 F. Supp. at 1531. Other federal and state courts have agreed. See, e.g., *Smith v. Norfolk & S. Ry. Co.*, No. 590-494 (N.D. Ind. Oct. 8, 1991); *Conner v. Missouri Pac. R.R.*, No. 90-C-562-E (N.D. Okla. March 14, 1991); *Mahony v. CSX Transp., Inc.*, No. 4:88-CV-13-HLM, 6-7 (N.D. Ga. Feb. 6, Apr. 16, 1990); *Nixon v. Burlington N. R.R. Co.*, No. CV85-384-BLG (1988 U.S. Dist. Lexis 16477) (D.Mont. Apr. 2, 1988); *Barger v. Chesapeake Ohio Ry.*, No. 90AP-402 (Ohio App. Nov. 15, 1990).

The Eighth Circuit is the only Court of Appeals to have rendered a decision consistent with the holding, but not the reasoning, of the panel's non-preemption ruling in this case. In *Karl v. Burlington N. R.R. Co.*, 880 F.2d 68 (8th Cir. 1989), the Court addressed preemption only in

passing and rejected a "belated" attempt by the railroad to assert FRSA preemption. *Karl* (1) mistakenly cited *Marshall* for the proposition that the FRSA does *not* preempt a negligence claim against the railroad when public authorities have chosen particular traffic-control devices for a crossing, (2) erroneously relied upon common law cases in which preemption was not raised, and (3) incorrectly applied an *implied* preemption test. The *Armijo* Court found *Karl* completely unpersuasive for the following reasons:

The *Karl* Court did not discuss the express preemption provision in 45 U.S.C. § 434. Rather, it focused on generally how state laws may be preempted if they actually conflict with [federal law]. . . . [T]he *Karl* decision ignores the first circumstance . . . where state law is preempted. . . when Congress defines explicitly the extent to which its enactment preempts state law. . . . In light of the express provision in §434, there is no need to determine whether state law in this case actually conflicts with the federal law. . . .

Armijo, 754 F. Supp. at 1532 n.4.

Although the panel below reached a result consistent with *Karl*'s holding, it clearly disagreed with the *Karl* analysis by finding that the FRSA expressly preempted Respondent's "train speed" claim given the Secretary's promulgation of federal train speed regulations. *Easterwood*, 933 F.2d at 1553-54. The panel also acknowledged that the Secretary had addressed the subject of Respondent's gate-arms claim, *id.* at 1553-54, and implicitly reasoned that federal grade crossing regulations would have preempted this claim if promulgated under FRSA authority. Nevertheless, the panel erroneously found that the Secretary's grade crossing regulations were promulgated solely under the authority of the non-preemptive Federal-Aid Highway Act, not the expressly-preemptive FRSA. As demon-

strated below, this holding is clearly erroneous and creates a significant conflict in the circuits. *Id.*

B. *The Decision Below Creates a Conflict in the Circuits on the Secretary's Statutory Authority to Regulate Rail Safety.*

The panel below erred in three material respects by finding that the Secretary's grade crossing regulations, which would preempt Respondent's claim under the panel's own analysis, lack preemptive effect because they were not promulgated under the FRSA. First, these regulations *were* promulgated under the Secretary's express FRSA authority. Second, even if the Secretary had issued the regulations *solely* pursuant to federal highway legislation, Section 204(b) of the FRSA (45 U.S.C. § 433(b)) encompasses such regulations within the FRSA's preemptive scope. Finally, the Fifth and Sixth Circuits, as well as numerous other courts, have held that *any* rail safety regulation promulgated "by the Secretary" is expressly preemptive under the FRSA.

Preliminarily, the panel's holding ignores the Secretary's delegation of rulemaking authority to several agencies within the Department of Transportation, which includes the Federal Railroad Administration ("FRA"), the Federal Highway Administration ("FHWA"), and other agencies. *See* 49 U.S.C.A. § 102-104 (1991 Sp. Pamphlet). The Secretary delegated rulemaking authority under numerous statutes (including the FRSA) to both the FRA and the FHWA. *See generally* 49 C.F.R. §§ 1.48 and 1.49. In stating that "the Secretary of Transportation has not promulgated any regulations regarding grade crossings under his general power to regulate railroad safety," the panel mistakenly confined its consideration to only those regulations promulgated by the Secretary through the FRA. *Easterwood*, 933 F.2d at 1555. The panel labored under the misimpression that since the Secretary promulgated regulations through the FHWA, rather than the FRA, the regulations were not preemptive. The panel

wrongly assumed (1) that the grade crossing regulations were not issued under authority of the FRSA, and (2) that the Secretary's decision to address crossing safety in part under his authority to regulate highway safety somehow divested the regulations of their preemptive effect.

1. *The Secretary regulated crossing safety under authority of the FRSA.*

The Secretary promulgated the regulations in 23 C.F.R. Parts 646, 655, 924, and 1204 *under authority of the FRSA*. Specifically, 49 C.F.R. § 1.48(o) and the "Statements of Authority" cited by the Secretary flatly contradict the panel's myopic assumption that the Secretary did not issue these regulations pursuant to preemptive FRSA authority. The Secretary's grade crossing regulations were established by the FHWA pursuant *both* to federal highway legislation *and* Section 204(b) of the FRSA (45 U.S.C. § 433(b)), and were issued "*under authority of*" various sections of the federal highway acts *and* 49 C.F.R. § 1.48. *See* 23 C.F.R. § 646.200 (Statement of Authority referencing 49 C.F.R. 1.48(o)); Part 655 (same); Part 924 (same); and Part 1204 (same). Specifically, under 49 C.F.R. 1.48(o) the Secretary delegated to the FHWA the authority to regulate grade crossings pursuant to Section 204(b) of the FRSA, 45 U.S.C. § 433(b):

The [FHWA] is delegated authority to:

(o) *Exercise the authority vested in the Secretary by section 204(b) of the Federal Railroad Safety Act of 1970 (84 Stat. 972, 45 U.S.C. 433(b)) with respect to the laws administered by the [FHWA] pertaining to highway safety and highway construction.*

49 C.F.R. § 1.48(o). Thus, FRSA Section 433(b) empowers the Secretary to regulate grade crossing safety under his or her authority over highway safety. The panel ignored Section 433(b) and erroneously confined its consideration to the Secretary's power to regulate under 45 U.S.C.

431(a)(1). See 933 F.2d at 1555. Since the Secretary clearly issued federal grade crossing regulations under FRSA authority, however, Respondent's claim is expressly preempted.

2. Even if the Secretary had regulated solely under authority of federal highway laws, Section 434 expressly preempts Plaintiff's claims.

Even if the Secretary had issued the regulations solely under federal highway legislation, the FRSA expressly encompasses such regulations within the preemptive scope of Section 434. The Secretary's authority for promulgating grade crossing safety regulations is codified at 45 U.S.C. § 433(b), which directs the Secretary to address grade crossing safety *under his or her authority over highway and traffic safety*:

In addition [to conducting the study of grade crossing safety mandated under § 433(a),] the Secretary shall . . . under the authority provided by this subchapter and pursuant to his authority over highway, traffic, and motor vehicle safety, and highway construction, . . . implement[] solutions to the grade crossing problem. . . .

45 U.S.C. 433(b) (emphasis added). Thus, the FRSA expressly contemplates the Secretary's use of authority granted under federal highway legislation to regulate and allocate the duty for selecting traffic-control devices at crossings.

The same FRSA House Report referenced in the panel opinion states that Congress was keenly aware that "problems will arise which cut across the existing statutes and the [FRSA]. In those situations, *the Secretary will be expected, if necessary, to issue rules under two or more statutes.*" House Report at 4114 (emphasis added). Accordingly, the Secretary expressly utilized authority granted under both the FRSA and federal highway

legislation to regulate the very issue that Respondent claims should be subject to state law control.

3. As the Fifth and Sixth Circuits have held, Section 434 preempts state regulation regardless of the Secretary's regulatory authority.

Finally, federal courts have uniformly held that Section 434 expressly preempts state law application to any rail safety subject matter addressed by a "rule, regulation, order or standard" adopted under *any source* of the Secretary's authority. As stated in *Atchison T. & S.F.Ry. v. Illinois Comm. Comm'n.*, 453 F. Supp. 920 (N.D. Ill. 1977):

"The [FRSA] provides that state action is preempted when the Secretary has issued orders or regulations covering the field. *This [preemption] is not limited to those [regulations] promulgated under that Act, but refers instead to any action taken by the Secretary.*"

Id. at 924. In other words, the statutory source of authority for the Secretary's rail safety regulations is irrelevant:

Section 434 refers to acts by 'the Secretary,' . . . and does not confine itself to acts pursuant to the FRSA. Thus, an act by the Secretary pursuant to . . . [a federal act that lacks a preemption provision] could preempt state law under the terms of Section 434.

Missouri Pac. R.R. v. Railroad Comm'n of Texas, 671 F. Supp. 466, 471 n.1 (W.D. Tex. 1987), *aff'd* 850 F.2d 264 (5th Cir. 1988), *cert. den.* 488 U.S. 1009 (1989) ("MOPAC II"). "Preemption is not limited to those regulations promulgated under the FRSA, but refers instead to any other rule, regulation, order or standard. . . adopted by the Secretary." *CSX Transp., Inc. v. City of Tullahoma*, 705 F.Supp. 385, 389 (E.D. Tenn. 1988).

The Sixth Circuit likewise stated that "FRSA preemption relates to *all* rules and regulations regarding railroad safety promulgated by the Secretary, whether or not such regulations are promulgated by the [FRA]. . . ." *CSX Transp., Inc. v. Public Utils Comm'n of Ohio*, 901 F.2d 497, 501 (6th Cir. 1990), cert. den. 111 S.Ct. 781 ("P.U.C.O.") (emphasis in original). Ohio petitioned this Court for review of the Sixth Circuit's interpretation that the source of the Secretary's regulatory authority for issuing rail safety regulations does not alter the preemptive effect of the Secretary's decision to regulate. Before denying certiorari, this Court requested the Solicitor General to express the views of the United States. See 111 S. Ct. 35. The United States agreed with the conclusion that Congress intended FRSA preemption to apply to *all* rail safety regulations issued by the Secretary, *whether pursuant to the FRSA or any other act*. See Brief of United States as *Amicus Curiae* to the Supreme Court in *P.U.C.O.*, No. 90-95, at 8-13 (October Term, 1990). The Solicitor General described the FRSA's legislative history as evincing an "intensive debate" over the "all-encompassing preemption provision" in the Act, and concluded that *any* regulation relating to rail safety expressly preempts state law:

Congress did not intend to limit the preemptive scope of the FRSA to regulations enacted under power given to the Secretary under the FRSA alone; rather, it contemplated that *all* of the Secretary's regulations relating to rail safety . . . would give rise to nationally uniform standards.

Id. at 7, 9 (emphasis in original). In other words,

[Congress] recognized that the Secretary had diverse sources of statutory authority, enacted over many years, with which to address rail safety issues. . . . [and that] preemption had to apply to regulations issued, not only under the new authority provided by the FRSA, but also

under the preexisting authority; otherwise, the desired uniformity could not be attained.

Id. at 11. The Eleventh Circuit's determination that federal grade crossing regulations are not preemptive under the FRSA flatly contradicts the Fifth and Sixth Circuit decisions in *MOPAC II* and *P.U.C.O.* and creates a clear conflict in the circuits.

The foregoing discussion leads inexorably to the three unshakable conclusions that merit this Court's review. First, the Secretary's "Statements of Authority" for the grade crossing regulations in issue explicitly reference the FRSA as an authorizing source of regulatory authority. These regulations are therefore expressly preemptive. Second, Congress' explicit command in the FRSA that the Secretary address grade crossing safety under his or her authority over "highway traffic safety" makes clear that Section 434's preemptive effect reaches the grade crossing regulations even if the Secretary had not utilized FRSA statutory authority. Third, uniform federal opinion, including *P.U.C.O.*, *MOPAC II*, and the well-reasoned position of the United States, compel the conclusion that the Secretary's regulation of grade crossing safety preempts Respondent's claim under FRSA Section 434 regardless of the statutory authority for the regulations issued.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that a writ of certiorari issue to review the decision of the Eleventh Circuit in this case.

This 15th day of November, 1991.

Respectfully submitted,

Jack H. Senterfitt,
Alston & Bird
1201 West Peachtree Street, N.W.
Atlanta, Georgia 30309-3424
(404) 881-7000
Counsel of Record

Richard T. Fulton
James W. Hagan
Alston & Bird
1201 West Peachtree Street, N.W.
Atlanta, Georgia 30309-3424
(404) 881-7000
Counsel for Petitioner

APPENDICES

Appendix A

Opinion of The United States Court of Appeals

**Mrs. Lizzie Beatrice EASTERWOOD,
Plaintiff-Appellant,**

v.

**CSX TRANSPORTATION, INC.,
Defendant-Appellee.**

No. 90-8851.

United States Court of Appeals,
Eleventh Circuit.

June 20, 1991.

Appeal from the United States District Court for the
Northern District of Georgia.

Before JOHNSON and COX, Circuit Judges, and
HENDERSON, Senior Circuit Judge.

JOHNSON, Circuit Judge:

This case arises on appeal following the district court's
grant of a motion for summary judgment in favor of the
defendant on the basis of federal preemption. 742 F. Supp.
676.

I. STATEMENT OF THE CASE

Thomas Easterwood, on February 24, 1988, was work-
ing for the Duncan Wholesale Company delivering wood
products in a long bed truck in Cartersville, Georgia.
While crossing the Cook Street railroad grade crossing, he
was struck and killed by a CSX train.

On June 3, 1988, Lizzie Beatrice Easterwood, Thomas'
widow, filed the wrongful death action in district court.
CSX answered, but it made no reference to the Federal

Railroad Safety Act in its pleading. The District Court ordered discovery completed by November 30, 1989 and any motions for summary judgment filed within 20 days of that date. On December 19, 1989, CSX moved for summary judgment, alleging, among other things, that the Federal Railroad Safety Act provided a complete defense. Easterwood did not complain to the district court about CSX's failure to raise this defense in its answer. The district court granted summary judgment. Easterwood brought a timely appeal to this court.

II. STANDARD OF REVIEW

The district court order granting summary judgment is subject to *de novo* review by this Court. See *Shipes v. Hanover Ins. Co.*, 884 F.2d 1357 (11th Cir.1989). This Court must ask whether there is any genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986).

III. ANALYSIS

A. The Failure to Raise the Pre-Emption Defense in the Answer

In its motion for a summary judgment, CSX raised for the first time the possibility that Easterwood's state law negligence claims were pre-empted by federal law. Easterwood now claims that federal pre-emption is an affirmative defense which should have been raised in CSX's answer. See Fed.R.Civ.P. 8(c). If federal pre-emption is an affirmative defense, CSX's failure to specifically plead the defense in its answer or amended answer results in the waiver of this defense. See *Morgan Guar. Trust Co. of N.Y. v. Blum*, 649 F.2d 342, 345 (5th Cir. Unit B 1981).

[1] Easterwood's failure, in the district court, to raise the argument that federal pre-emption is an affirmative defense prevents us from sanctioning CSX for its failure to

include this affirmative defense in its answer. As a "general principle of appellate review[,] an appellate court will not consider issues not presented to the trial court." *McGinnis v. Ingram Equip. Co., Inc.*, 918 F.2d 1491, 1495 (11th Cir.1990) (en banc). One exception to this rule is "when a pure question of law is involved and a failure to consider it would result in a miscarriage of justice." *Martinez v. Mathews*, 544 F.2d 1233, 1237 (5th Cir.1976). While it is undisputed that whether this affirmative defense was waived is a pure question of law, neither party can argue that our decision not to reach the issue would result in a miscarriage of justice. First, had Easterwood mentioned this technical failure of the pleadings before the district court, the district court could have given CSX leave to amend its answer, see Fed.R.Civ.P. 15(a), thus remedying any problem. Second, our Circuit has noted that the purpose of requiring affirmative defenses to be pled in the answer is to facilitate trial preparation. See *Hassan v. United States Postal Serv.*, 842 F.2d 260 (11th Cir.1988). In the past, we have been reluctant to enforce strictly the harsh waiver requirement where the plaintiff is unable to demonstrate any prejudice due to the lack of notice. *Id.* Easterwood has not established any prejudice due to this technical failure of the pleadings. Not only did Easterwood fail to move to reopen discovery, but she also told the district court, during oral arguments, that the existing exhibits, affidavits, and depositions were sufficient to defeat the motion for summary judgment. Therefore, it is not a miscarriage of justice if we decline to allow Easterwood to raise this argument, for the first time, on appeal.

B. The Appropriateness of Summary Judgment

Easterwood alleged that CSX was negligent for a number of reasons. First, Easterwood alleged that CSX was negligent for failing to maintain the crossing properly by failing to trim vegetation and level a hump near the tracks. Second, Easterwood alleged that CSX was negligent in maintaining the crossing properly by failing to install adequate warning signals. And third, Easterwood alleged that

the train was negligently exceeding a reasonable speed at the time of the accident.¹ We will first examine whether, as CSX claims, federal law pre-empts each of these state law claims. We will then determine whether summary judgment was warranted for any of the surviving claims.

1. Federal Pre-emption

[2] The Supreme Court has recognized that state law² is pre-empted under the Supremacy Clause in three circumstances. First, pre-emption will occur when Congress explicitly indicates that it intends to pre-empt state law. *English v. General Elec.*,—U.S.—, 110 S.Ct. 2270, 2275, 110 L.Ed.2d 65 (1990). The courts, however, will attempt to narrowly tailor the scope of the pre-emption to match congressional intent. *Id.* Second, pre-emption will be implied when Congress has indicated that the federal government will exclusively occupy a field of regulation. The *English* Court noted that congressional intent can be implied when the statutes and regulations are so pervasive that there is

¹ Easterwood also alleged in her complaint that the train was negligent per se for violating a town speed ordinance and that CSX was negligent for failing to install an energy absorbing device in the front of the train. At the start of oral argument before the district court, Easterwood specifically abandoned these two claims. Easterwood cannot, at this late date, resurrect these claims in this court.

² It is clear that if federal law pre-empts state law then state tort law would be pre-empted regardless of whether it is common-law based or statutorily based. See *San Diego Bldg. and Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959). The Supreme Court's holding in *Silkwood v. Kerr-McGee*, 464 U.S. 238, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984), is not to the contrary. In *Silkwood*, the Court held that Congress explicitly pre-empted state legislative and regulatory law in the nuclear power field while at the same time Congress explicitly chose to allow private parties to bring tort suits under state tort law. The Court noted that Congress' explicit intent to pre-empt only a portion of state law made nuclear power a special case. We decline to find, as Easterwood urges, that *Silkwood* holds that tort law is somehow immune to pre-emption.

no room left for state regulation or when there are strong federal interests in exclusively regulating the field. *Id.* However, congressional intent must be " 'clear and manifest' " if the allegedly pre-empted field includes areas of traditional state interest. *Id.* (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977)). Third, pre-emption will be implied when state law "actually conflicts with federal law." *Id.* Under this variety of pre-emption, if a party cannot comply with both federal and state law or when state law interferes with the accomplishment of congressional objectives, courts will imply pre-emption.

With these standards in mind, we turn to the legislative history of the Federal Railroad Safety Act of 1970, Pub.L. No. 91-458 (codified as amended at 45 U.S.C.A. § 421 *et seq.* (1986)). The Railroad Safety Act is the primary source of legislation dealing with the various railroad safety problems. The legislative history indicates that Congress was wary of the role of the states in rail safety. The House report stated that "[t]he committee does not believe that safety in the Nation's railroads would be advanced sufficiently by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems." H.Rep. No. 1194, 91st Cong., 2d Sess., reprinted in 1970 U.S. Code Cong. & Admin. News 4104, 4109 (hereinafter House Report). The committee also noted that "where the federal government has authority, with respect to rail safety, it preempts the field." House Report at 4108 (emphasis added).

The Railroad Safety Act was the out-growth of a report from a task force on railroad safety. The task force was primarily concerned with grade crossing accidents and derailments. See House Report, Appendix F, 4125, 4126-27. The task force noted the problems inherent in a hodge-podge of state safety regulations and concluded that "railroad safety . . . requires a more comprehensive national approach." *Id.* at 4127. The task force recognized the

potential tension between the need for increased speed and efficiency and the need for safety. *Id.* at 4128. One of its conclusions was that in order to obtain both higher speeds and increased safety, safer grade crossings and a better educated public were needed. *Id.* The task force concluded that "[t]he motoring public is part of the safety problem at the grade crossing." *Id.* The task force recommended, among other things, a set of "uniform procedures and standards" to regulate grade crossings. *Id.* at 4130.

The Railroad Safety Act sought "to promote safety . . . and to reduce railroad-related accidents." 45 U.S.C.A. § 421 (1986). The Secretary of Transportation, through the Act, was authorized to "prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety . . ." 45 U.S.C.A. § 431(a)(1) (1986). Congress declared "that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable." 45 U.S.C.A. § 434 (1986). However, Congress passed a savings clause, allowing states to adopt or continue in force any law relating to railroad safety until the Secretary of Transportation adopted a rule covering the same subject matter.³ *Id.*

³ Congress also passed a second savings clause permitting states to adopt more stringent state rules in order to eliminate a local safety hazard as long as the state rule is not incompatible with federal standards and the state rule does not create an "undue burden on interstate commerce." 45 U.S.C.A. § 434 (1986). This savings clause is irrelevant to the case at hand because a state does not legislate a general duty of care in order to eliminate a local safety hazard. The legislative history makes it abundantly clear that this savings clause is to be narrowly construed. The House Report states:

The purpose of this . . . provision is to enable the States to respond to local situations not capable of being adequately encompassed within uniform national standards. The States will retain authority to regulate individual local problems where necessary to eliminate or reduce essentially local railroad safety hazards. Since these local hazards would not be

We can draw a few conclusions from this legislative history. The legislative history makes clear that because Congress was concerned with the problems created by the hodgepodge of state regulations it explicitly stated that it intended to pre-empt all state regulations covering the same subject matter as the federal regulations. Therefore, our initial task is to examine each claim and determine if any federal regulations have been promulgated which cover the conduct at issue. In such cases, we will find explicit federal pre-emption, but we will attempt to narrowly tailor the pre-emption to match Congress' intent. However, even in the absence of a specific regulation, it is entirely possible that the breadth of the regulations, in the context of Congress' intent to pre-empt the field of railroad safety regulation, *see* House Report at 4108, may be sufficient for us to imply pre-emption of the entire field.

a. Speed Limit

[3] Easterwood claims that the accident was caused because the train was traveling at a negligently high rate of speed. Various affidavits from the parties estimate the train speed at 32-50 m.p.h. on a section of track with a maximum speed of 60 m.p.h. We note that the question of train speed has been addressed by Congress through the Secretary of Transportation. The Secretary has established regulations governing the maximum speed for passenger and freight trains on various classes of track. *See* 49 C.F.R. 213.9 (1990). We therefore find this claim to be pre-empted since Congress has stated that as soon as the Secretary has established a safety regulation all state regulations govern-

Statewide in character, there is no intent to permit a State to establish Statewide standards superimposed on national standards covering the same subject matter.

House Report at 4117. We therefore find this savings clause inapplicable to the case at hand.

ing the same area are pre-empted. See 45 U.S.C.A. § 434 (1986).

[4] Easterwood first argues that pre-emption is inappropriate because the speed limits were not adopted in order to minimize the number of grade crossing accidents. Easterwood notes that the various speed limits found in 49 C.F.R. 213.9 (1990) are related to the class of track and the curve of the track. See 49 C.F.R. § 213.57 (1990). Easterwood notes that sections of track are classified on the basis of several factors including the track ballast, 49 C.F.R. § 213.103 (1990), the number and quality of the cross ties, 49 C.F.R. §§ 109, 113 (1990), etc. Easterwood points to these factors and notes that the speed limits are not related to the density of the surrounding population. Easterwood, therefore, concludes that the Secretary adopted the speed limits to prevent derailments and not to prevent grade crossing accidents. However, the Supreme Court held in *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963), that it is irrelevant to pre-emption analysis whether the state law's objectives are similar to or different from the federal law's objectives. Pre-emption analysis turns on Congress' intent to pre-empt state law and on the nature of the federal regulations. The *Florida Lime & Avocado Growers* Court noted that a comparison of the similarities and divergences in the objectives of the federal and state regulations is simply a poor predictor of whether the federal regulations will pre-empt state law. *Id.* Moreover, Easterwood does not point to any legislative history for the speed limits and therefore she asks us to guess at the motives behind the Secretary of the Treasury. Such guessing is inherently suspect. While Easterwood assumes that the speed limits are designed to prevent derailments, it is equally valid to assume that the speed limits were set low enough that, in conjunction with adequate grade crossing signals and gates, the speed limits were intended to lessen the number of grade crossing accidents as well as lessen the chances of derailments.

Easterwood next argues that CSX's compliance with a speed limit should not affect a finding of negligence. Easterwood draws an analogy between compliance with the train speed limit and compliance with the national highway speed limit. See 23 U.S.C.A. § 154 (1990). Easterwood argues that an automobile driver's compliance with the 65 m.p.h. federal speed limit does not insulate a driver from liability. See Restatement (Second) of Torts § 288C (1965) ("Compliance with a legislative enactment . . . does not prevent a finding of negligence where a reasonable [person] would take additional precautions"). If the train speed limits were not part of a comprehensive statute, perhaps Easterwood's position would have merit. The code section governing highway speed limits does not directly overrule contrary state laws. This code section places conditions on the use of federal moneys. It therefore, only indirectly, establishes uniformity. More importantly, the train speed limits are part of a statutory scheme which explicitly pre-empts state regulations covering the same subject matter. While Easterwood's argument is superficially persuasive, the fundamental differences in the statutory scheme and legislative histories of the two acts require us to find federal pre-emption in the case of train speed limits.

b. Vegetation

[5] Easterwood also claims that excessive vegetation on the side of the track obstructed the views of the train engineers and the decedent, thereby causing the accident. We find this claim to be partially pre-empted. Under 49 C.F.R. § 213.37 (1990), track owners must keep vegetation on or immediately adjacent to the tracks under control. Because the Secretary has chosen to regulate vegetation, Congress explicitly has pre-empted all state regulation in this area. See 45 U.S.C.A. § 434 (1986); See also *Missouri Pac. R.R. Co. v. Railroad Comm. of Tex.*, 833 F.2d 570 (5th Cir.1987) (holding that 49 C.F.R. § 213.37 pre-empts all state regulation of vegetation immediately adjacent to railbed).

However, while the Secretary has chosen to regulate the vegetation on and immediately adjacent to the railbed, the Secretary has not regulated vegetation which is not immediately adjacent to the railbed. *Id.* Therefore, we choose to adopt that portion of *Missouri Pac. R.R. Co.* dealing with state regulation of railroad vegetation. To the extent that Easterwood is bringing a claim for the vegetation near, but not immediately adjacent to, the tracks, this claim is not pre-empted.

c. *Adequacy of the Grade Crossing*

Easterwood also argues that the grade crossing was inadequately constructed. Easterwood claims, among other things, that the flashing lights were positioned in such a way that they could be obscured by the morning sun. Easterwood also complains that the grade crossing did not have a cross bar.

While the legislative history of the Federal Railroad Safety Act evinces a strong concern about the hundreds of annual deaths in grade crossing accidents, neither the Act nor the regulations specifically address the problem through federal regulation of the signals and the design of grade crossings. The Act requires the Secretary of Transportation only to study problems with existing grade crossings, *see* 45 U.S.C.A. § 433 (1986), and to create grade crossing demonstration projects, *see* 45 U.S.C.A. § 445 (West Supp.1990). Moreover, the Secretary of Transportation has not promulgated any regulations regarding grade crossings under his general power to regulate railroad safety. *See* 45 U.S.C.A. § 431(a)(1) (1986); *see also* 49 C.F.R. Parts 200-240 (1990).

Congress has passed legislation elsewhere in the code dealing with the grade crossing problem. Part of the chapter dealing with federal aid for highway projects includes a provision requiring states to conduct a systematic survey of all railroad crossings and then create and implement a schedule for bringing the grade crossings into compliance

with the Manual on Uniform Traffic Control Devices for Streets and Highways. *See* 23 U.S.C.A. § 130 (1990); 23 C.F.R. § 646.214(b)(1) (1990). The states then would be eligible to use federal highway funds to aid the improvements. *See* 23 U.S.C.A. § 130(a) (1990).

[6] CSX claims that the Railroad-Highway Crossing section of the chapter on Federal-Aid Highways pre-empts all state law. We disagree. This section of the code requires the states to survey all of the grade crossings and to formulate a schedule of possible projects. 23 U.S.C.A. § 130(d) (1990). This section does not explicitly or implicitly pre-empt any state laws except perhaps any laws dealing with surveying and prioritizing projects. First, as opposed to the Federal Railroad Safety Act, *supra*, this section contains no explicit provisions pre-empting contrary or similar state law. Second, we are unable to imply pre-emption because this statute is not such a pervasive set of regulations that we could fairly imply a congressional intent to pre-empt the field.⁴ The statute allows states to apply for federal aid. While Congress could have attached conditions on the aid money which would pre-empt all state laws, it did not. Finally, we are unable to find any actual conflict between the state and federal law. Allowing tort suits to go forward against railroad companies simply does not affect (or at best it only tangentially affects) the provision of federal aid to the states to help them build better railroad grade crossings.

[7, 8] Nevertheless, CSX points to Judge (now Justice) Kennedy's opinion in *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149 (9th Cir.1983). The *Burlington Northern* court implied in *dicta* that when a crossing has been upgraded by the states through the federal highway aid pro-

⁴ Moreover, since the allegedly pre-empted field includes the pre-emption of state tort law, an area of traditional state interest, we would have to find a "clear and manifest" congressional intent in order to imply pre-emption. *See English v. General Elec.*, 110 S.Ct. at 2275.

gram then the railroads are insulated from liability. *Id.* at 1154. Even if *Burlington Northern* were the law of this Circuit,⁵ this language is distinguishable from the case at bar. The record reflects that due to various financial constraints and logistical problems, the state wanted to upgrade the site but was unable to perform the upgrade. We hold that a policymaker's failure to act is insufficient to constitute pre-emption. We therefore adopt the conclusion of the Fifth Circuit and find that there is a qualitative difference between a failure of a policymaker to act and a case where the policymaker evaluates a situation and then decides not to act "because [he or she has] determined it is appropriate to do nothing." *Missouri Pac. R.R. Co.*, 833 F.2d at 576. Therefore, because the state has neither upgraded the grade crossing nor affirmatively decided that the existing crossing was adequate, we have no occasion to decide whether a federally sponsored upgrade would insulate the railroad from liability. We do hold that, in the absence of a decision by a federally designated policymaker, state common-law liabilities are not affected by the federal highway aid provisions.

d. *The Hump in the Road*

[9] Finally, Easterwood claims that there is a steep hump in the road elevating the railroad track above the roadway. Easterwood claims that traffic is forced to slow down in order to navigate over the hump. CSX does not cite, nor can we find, any federal statute or regulation regulating the angle of the roadway as it approaches the railroad tracks. Therefore, we conclude that this claim is not pre-empted.

In short, Easterwood's claims based on CSX's allegedly negligent speed and CSX's failure to trim the vegetation

⁵ In light of the preceding analysis, we have reservations about the holding of *Burlington Northern*.

on or immediately adjacent to the tracks are pre-empted by federal law. Easterwood's claims based on CSX's failure to trim non-adjacent vegetation, CSX's failure to remove the hump in the road, and CSX's negligence in designing the grade crossing, all survive federal pre-emption analysis. We therefore turn to state law to determine if summary judgment was warranted for any of these claims.

2. The Surviving State Law Claims

a. *The Vegetation Claim*

Easterwood claims that the vegetation on the side of the track contributed to the accident. The district court granted summary judgment because it held that there was no evidence that the vegetation either played a role in this incident or was within the defendant's control.

[10, 11] We reverse the district court's grant of summary judgment on this claim for two independent reasons. After closely studying the defendant's briefs before the district court and before this court, we are unable to find any summary judgment request by the defendant on the vegetation claim. The district court therefore acted *sua sponte*. The district court may grant summary judgment on an issue only if a party moves for summary judgment on that issue. See Fed.R.Civ.P. 56(b) & (c).

[12] We also reverse the district court because the summary judgment is simply not warranted. Summary judgment is warranted only when "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). However, there is more than adequate evidence in the record to support the inference that vegetation played a role in this accident. Among other pieces of evidence, the brakeman on the train, Bobby Lanham, reported in his deposition that immediately following the accident he told an investigating police officer that some bushes and trees played a role in the accident. While this piece of evidence

alone mandates denial of the defendant's summary judgment motion, one of the plaintiff's experts, Fogarty, stated in his deposition that the trees contributed to the dangerousness of the crossing. That statement, in conjunction with the rule that all evidence must be viewed in the light most favorable to the non-moving party, also would be sufficient to require a denial of summary judgment. See *Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1080 (11th Cir.1990).

[13] Second, there is adequate evidence in the record demonstrating that the railroad is responsible for the vegetation. Fogarty testified that the trees were on the railroad's property. And, regardless of whose property the trees were on, the trees contributed to the dangerousness of the intersection and therefore increased the need for better signals. Therefore, even if the trees are out of the railroad's control, their very presence increases the need for the railroad to take other steps to improve the safety of the intersection. Finally, the Georgia code places the initial burden of production on the railroad to prove all facts that are peculiarly within the railroad's knowledge. Ga.Code Ann. § 46-8-292 (1982); see also *Southern R.R. Co. v. James*, 170 Ga.App. 73, 316 S.E.2d 159 (1984).⁶ Thus, the statute places the burden of production upon the railroad to show that the trees are not on the railroad's property.⁷

⁶ In this diversity action, the substantive law to be applied is Georgia tort law, while federal law governs the procedure. See *Erie R.R. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). Despite their procedural nature, burdens of proof are sufficiently related to substantive rights that they are governed by state law in diversity actions. See *Cities Service Oil Co. v. Dunlap*, 308 U.S. 208, 60 S.Ct. 201, 84 L.Ed. 196 (1939).

⁷ At trial, the burden of proving pre-emption rests with the party asserting it. Therefore the defendants may rebut the vegetation claim by establishing that all the trees at issue are those covered by federal

b. *The Hump in the Road*

Easterwood claims that the hump in the road contributed to the accident. The District Court granted summary judgment because it held that there was no evidence that the hump either played a role in the accident or was within the defendant's control. We reverse the district court because once again the defendants did not move for summary judgment on this issue.

[14] We also reverse the district court on the independent ground that summary judgment on this issue is not warranted. Easterwood has placed into the record a plethora of evidence demonstrating that the hump was dangerous and contributed to the accident. Fogarty testified at his deposition at length about the steepness of the hump and he stated that studies have concluded that when navigating similar humps drivers slow down and concentrate to such a degree on the hump that they fail to notice approaching trains. The expert also mentioned that the literature has warned of the dangers of humps and railroad crossings for over 40 years. Moreover, the brakeman on the train testified that Mr. Easterwood drove very slowly up the hump and onto the train tracks. Mr. Easterwood's conduct matches the conduct found in the studies provided by the expert. Because we are required to draw every reasonable inference in favor of the non-moving party, *Earley*, 907 F.2d at 1080, we must infer that the hump caused Mr. Easterwood to drive in the manner that he did.

[15, 16] Furthermore, the district court's holding that there was insufficient evidence that the defendant was responsible for maintaining the hump is also incorrect. First, the Georgia Code explicitly recognizes the duty of the railroad to maintain all of its grade crossings "in such condition as to permit safe and convenient passage of public

regulations. Of course, this is a question of law to be decided by the trial judge.

traffic." Ga.Code Ann. § 32-6-190 (1985). This duty at the very least extends two feet beyond the cross ties. *Id.*⁸ Second, the Georgia Code states that proof that a train hit a person is rebuttable prima facie evidence of negligence on the part of the railroad. Ga.Code Ann. § 46-8-292 (1982). Therefore, the district court cannot issue summary judgment until the railroad overcomes its burden of production. Third, there was evidence that the hump contributed to the dangerousness of the grade crossing and therefore increased the need for better signals and warnings.

c. The Warnings at the Grade Crossing

CSX argues that it met, as a matter of law, its duty to warn because it claims that the existing warning signals and the train's whistle were sufficient to put Mr. Easterwood on notice. CSX points out that the train's head light was illuminated and that the whistle was blowing. CSX also alleges that the intersection had three separate sets of dual, red warning lights which are activated by an approaching train 1500 feet from the intersection. Therefore, motorists have anywhere from 17 to 32 seconds notice of the train's approach.⁹ CSX also alleges that the crossing had passive warnings including two reflectorized railroad crossbuck signs, a white stop bar and a white "RXR" warn-

⁸ The statute strongly implies that the duty may extend beyond the two feet mentioned in the statute.

⁹ The engineer claimed that the train was travelling at 32 m.p.h. or 46.93 feet per second. At such a speed, we take judicial notice that the 1500-foot motion detector would afford automobiles approaching the grade crossing a 31.96-second warning. Various witnesses claimed the train was going up to 50 m.p.h. or 73.33 feet per second which would result in a 20.46-seconds notice. CSX claims that because the track has a 60 m.p.h. speed limit its trains can travel up to 60 m.p.h. or 88 feet per second which would result in 17.05 seconds of notice. While the plaintiff's claim of negligence based on excessive speed is pre-empted, evidence of speed is relevant to the issue of the adequacy of the warning system.

ing painted on Cook street, and a yellow "RXR" advance railroad warning sign.

CSX argued to the district court that as an alternative to finding pre-emption for this claim, the district court could grant summary judgment on the claim itself. The district court granted summary judgment on pre-emption so it did not reach CSX's alternative argument. CSX renewed the alternative argument in this Court. Because we decline to find pre-emption, we now turn to the merits of this claim.¹⁰

[17] Georgia law recognizes a cause of action for a failure by a railroad to warn adequately of the approach of a train to a grade crossing. *See Isom v. Schettino*, 129 Ga.App. 73, 199 S.E.2d 89 (1973). CSX argues that the existing passive and active warnings are sufficient for this Court to conclude that it was not negligent as a matter of law. However, there is a significant amount of evidence in the record suggesting that this grade crossing is extremely dangerous and that better warnings were needed. One traffic expert, Burnham, testified in his deposition that the design of the grade crossing made it extremely hazardous; he testified that the road does not cross the tracks on a perpendicular angle; that there are private roads placing substantial traffic into the intersection; and that immediately after crossing the tracks a driver would have to attempt to merge with highway traffic. Another expert, Fogarty, testified about the dangers of the hump in the grade crossing. There also are various references throughout the depositions that more than a few accidents had occurred at this

¹⁰ We found in section III.B.1.c., *supra*, that this claim was not pre-empted by federal law. The Georgia Court of Appeals has rejected the parallel argument that a similar claim was pre-empted because the Georgia Department of Transportation allegedly decides which warnings are appropriate for a given grade crossing. *See Southern R.R. Co. v. Georgia Kraft Co.*, 188 Ga.App. 623, 373 S.E.2d 774 (1988).

crossing. Both of the two traffic experts testified that the existing signs were not in compliance with various regulations and standard accepted engineering practices. One of the experts, Burnham, witnessed the existing warning signals malfunctioning by signaling that a train was coming when none ever came. Another witness, Taylor, stated that he was almost hit by a train a week before the accident and that the signals never warned him of the train's approach. Burnham also stated that the stop bar painted on the road was faded. Fogarty stated that one of the warning crossbucks was partially obscured by a power pole and thus fell below regulations and that the second cross buck was positioned so that it was not visible to approaching traffic. Fogarty also concluded that the warning lights failed to meet standards because they were located and designed so that they were easily obscured by the morning sun. A third expert, McLendon, noticed that the warning lights were extremely dirty. As a result of the dangers of the intersection and the inadequacies of the existing warning systems the two traffic experts and a retired railroad engineer concluded that gates were needed at this intersection. It is clear that summary judgment is not warranted because there is a material issue of fact as to whether the existing warning signs are adequate.

d. Contributory Negligence

— CSX finally argues that summary judgment should have been granted because Easterwood's action is barred under the doctrine of contributory negligence. In grade crossing accidents under Georgia law, a plaintiff's action is barred if he or she is more than 50% at fault. See Ga. Code Ann. § 46-8-291 (1982). The existence of contributory or comparative negligence is one of fact "and will not be determined by the courts as a matter of law except in palpably clear, plain and undisputed cases." *Iler v. Seaboard Air Line R. Co.*, 214 F.2d 385, 388 (5th Cir.1954) (applying the Georgia grade crossing comparative negligence law).

In Georgia, contributory negligence has been held to be clear in at least two types of cases. If the driver is aware of the train and attempts to beat the train, then the proximate cause of the accident is not, as a matter of law, the railroad's failure to warn. See *Southern Ry. v. Blake*, 101 Ga. 217, 29 S.E. 288 (1897).¹¹ Similarly, if the driver saw the train, or in the exercise of ordinary care should have seen the train, and nevertheless continued across the tracks, then the railroad cannot be held liable for failing to warn. See *Seaboard Coast Line R.R. Co. v. Mitcham*, 127 Ga.App. 102, 192 S.E.2d 549 (1972).¹²

[18] CSX argues that summary judgment is warranted on this claim because Easterwood was wholly at fault for entering the grade crossing when he did. There, however,

¹¹ CSX relies heavily upon *Joyce v. Georgia S. & Fla. Ry. Co.*, 122 Ga.App. 712, 178 S.E.2d 575 (1970), a case which in many ways resembles the case at hand. However, we find *Joyce* distinguishable because despite the similarities there is one large distinguishing factor: the court in *Joyce* concluded that the decedent "must have seen the [warning] signal, as disclosed by the stopping of his vehicle short of the tracks." *Id.* 178 S.E.2d at 576. This fact is crucial to *Joyce's* analysis and absent from the case at hand. There is absolutely no evidence in the record that the decedent actually saw, or acted as if he saw, either the signal or the train before he went across the tracks.

¹² Oddly enough, there is a whole genre of cases in which automobile drivers hit the twentieth or so car in a freight train and then attempted to sue the railroad for the failure to warn. See, e.g., *Pate v. Georgia S. & Fla. Ry. Co.*, 196 Ga.App. 211, 395 S.E.2d 604 (1990); *Suib v. Seaboard Sys. R.R., Inc.*, 185 Ga.App. 713, 365 S.E.2d 842 (1988); *Seaboard Coast Line R.R. v. Sheffield*, 127 Ga.App. 580, 194 S.E.2d 484 (1972). The Georgia Courts have uniformly denied recovery in these "car hits train" cases. In doing so, the courts have broadly stated that, absent special circumstances, railroads do not owe a duty to warn drivers of "something as starkly obvious as a train." *Sheffield*, 194 S.E.2d at 485. However, it is clear that, because of the context of the language in the original *Sheffield* opinion and because this language has been quoted only in these "car hits train" cases, the language has been implicitly limited by the Georgia courts to this genre of cases.

is absolutely no evidence that Easterwood tried to beat the train across the tracks or that he actually knew about the train before starting to cross the tracks. The undisputed evidence shows that Mr. Easterwood slowly approached the intersection and without varying his speed slowly drove into the path of the train. Viewing this evidence in the light most favorable to the non-moving party, *Earley*, 907 F.2d at 1080, we can only conclude that Mr. Easterwood did not attempt to beat the train across the tracks and that he actually was unaware of the oncoming train.

[19] While there is absolutely no evidence showing that Mr. Easterwood actually knew about the signals or about the oncoming train before entering onto the tracks, the evidence as to whether he should have known about the oncoming train is conflicting. Ms. Stephenson stated in her affidavit that she was directly behind Mr. Easterwood and that when she was a block away she heard the train whistle and the rumble of the train. She then stated that she saw the red flashers warning of the oncoming train before they got to the grade crossing. Ms. Stephenson therefore both saw and heard indications that a train was coming. However, there are disputes of material facts as to both of these areas of Ms. Stephenson's statement. Another eye witness, Sheppard, disputed Ms. Stephenson's statement that the lights activated when Mr. Easterwood was some distance from the intersection. This witness stated that the lights activated "just prior to the time Mr. Easterwood drove under them." That same witness testified that the sun was bright that morning and that Mr. Easterwood was traveling east. The plaintiff's expert, Fogarty, testified that the warning lights were poorly designed and poorly located, increasing the risks of a problem with glare. Furthermore, there was considerable evidence that the warning lights were highly unreliable and that because they produced false warnings, locals tended to ignore the warnings. Easterwood depos. at 64 (stating that she has been with her husband on at least one occasion when the lights flashed but no train showed up); Burnham depos. at 28, 39

(stating that while he was studying the grade crossing the lights malfunctioned and that several cars ignored the lights and went through the grade crossing.) Also, there was extensive record support for the proposition that motorists had a limited view of any oncoming trains due to various obstructions, including vegetation. Fogarty depos. at 62-64 (The line of sight was 150' when motorists need 720' to observe oncoming trains going 30 m.p.h. and to be able to clear the tracks in time.) It therefore is debatable whether Mr. Easterwood saw the flashing warning lights due to their timing and the possibility of glare.¹³ Furthermore, there is evidence in the record showing that if Mr. Easterwood had not seen the warning lights, then the inadequate line of sight would have prevented him from seeing the train with sufficient time to avoid the accident.

Also there is some dispute in the record as to whether Mr. Easterwood should have reasonably heard the train and the various bells and whistles. First, there is evidence in the record that Mr. Easterwood had turned on his heater on that cold morning. Taking all the reasonable inferences in the non-movant's favor, we can conclude that he probably had his windows closed. There also were statements,

¹³ CSX is correct that Ga.Code Ann. § 40-6-140 (1989) which requires motorists to stop at all grade crossings when "[a] clearly visible . . . signal device gives warning of the immediate approach of a train" results in violators being deemed contributorily negligent as a matter of law. See *Atlantic Coast Line R.R. Co. v. Hall Livestock Co.*, 116 Ga.App. 227, 156 S.E.2d 396 (1967). However, it is a disputed question of fact whether the signal device was "clearly visible." Furthermore, the *Hall Livestock* court held that the statute applied only to those who were aware of an oncoming train and ventured onto the tracks. The court noted that cases brought by motorists who were *actually* unaware of the nearness of the train were governed by common-law determinations of reasonableness and not by this statute. *Id.* 156 S.E.2d at 398.

contradicting Ms. Stephenson's statements, that the train did not sound its whistle.¹⁴

In conclusion, there is sufficient evidence in the record creating a dispute of material issues of fact for us to conclude that summary judgment is not warranted on the issue of whether Mr. Easterwood's contributory negligence is the cause of the accident. In so holding we note that contributory negligence is almost invariably a question for the jury and that CSX bears the burden of proof on this issue at trial.

IV. CONCLUSION

We AFFIRM the court below on its finding that federal law pre-empts the speed claim and a portion of the vegetation claim. We REVERSE the court below on its finding that federal law pre-empts the negligently designed crossing claim and a portion of the vegetation claim. We also REVERSE the district court's grant of summary judgment for each of the non-pre-empted claims and for the case as a whole. We REMAND this case for further proceedings consistent with this opinion.

¹⁴ While generally positive testimony (such as I heard the whistle) is better than negative testimony (such as I did not hear the whistle) the district court may not accept positive testimony to the exclusion of negative testimony on a motion for summary judgment. It is a credibility question whether one witness' memory is more reliable than another witness' memory, and such credibility determinations are not to be made on a motion for summary judgment. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2510-2511, 91 L.Ed.2d 202 (1986).

Appendix B

Order of The United States District Court

**Lizzie Beatrice
EASTERWOOD, Plaintiff,**

v.

**CSX TRANSPORTATION,
INC., Defendant.**

Civ. A. 4:88-CV-0141-RLV.
United States District Court,
N.D. Georgia.
Aug. 8, 1990.

ORDER

VINING, District Judge.

This negligence action is before the court on the defendant's motion for summary judgment and the plaintiff's motion for reconsideration of the court's oral grant of summary judgment after hearing arguments by the parties. Also pending is the plaintiff's motion to file supplemental evidence in opposition to the motion for summary judgment. Having considered the parties' briefs and oral arguments, the court hereby GRANTS the defendant's motion for summary judgment and DENIES the plaintiff's motion for reconsideration and motion to supplement the record.

[1] The plaintiff seeks to file with the court supplemental evidence supporting its motion for reconsideration of the court's March 22, 1990, oral grant of summary judgment for the defendant. This motion is premised on the plaintiff's argument that she did not have sufficient time to adequately respond to the motion for summary judgment because the action was on a trial calendar scheduled to begin approximately four weeks after the filing of

the motion for summary judgment. The court, however, finds this argument insufficient to justify the court's consideration of such evidence at this late stage of the proceedings.

After reviewing the parties' summary judgment briefs this action was removed from the trial calendar and oral arguments were scheduled for March 22, 1990. At no time during this three month delay or prior to oral arguments did the plaintiff file with the court additional affidavits or exhibits or a motion to extend time. Instead, at oral arguments plaintiff's counsel sought to introduce a single additional affidavit. The court refused to consider the affidavit because it was not filed prior to the hearing of the motion for summary judgment. Similarly, plaintiff now seeks to file with the court evidence intended to create genuine issues of material fact in an attempt to avoid summary judgment. The court, however, finds no justification for the plaintiff's failure to produce evidence available or known to her at the time of the original hearing. Accordingly, the court finds that such evidence was not filed in a timely manner and will not be considered.

In this action the plaintiff seeks damages for the death of Thomas Easterwood, ("Easterwood"), in connection with an accident involving Easterwood and a CSXT train on February 24, 1988, at the Cook Street crossing in the City of Cartersville, Georgia. The plaintiff alleges that CSXT was negligent in failing to install gate arms at the Cook Street crossing, in operating the train at an unsafe speed, and in allowing vegetation to grow along the side of the track thus preventing Easterwood from seeing the train.¹

¹ The plaintiff's complaint also contained allegations that the defendant was negligent in failing to comply with the Cartersville Municipal Train Speed Ordinance and in failing to equip the train with an energy absorbing device. At oral argument the plaintiff withdrew these claims.

The defendant argues that Easterwood, without slowing or stopping, drove his motor vehicle through the activated red flashing warning lights and, in disregard of the train whistle, into the path of the oncoming train. Therefore, the defendant contends, there was no actionable negligence by CSXT or its agents. The defendant seeks summary judgment as to all claims based on the absence of evidence showing that the defendant's negligence was the proximate cause of the railroad crossing accident or, in the alternative, summary judgment on three of the plaintiff's claims which, the defendant argues, are preempted by federal law.

[2] Under the supremacy clause, when Congress manifests an intent that federal law occupy and control a certain field, states are precluded from interfering with the federal law. Federal preemption insures that a state's statutory and common law principles do not conflict with or frustrate the accomplishment of any federal mandate. *See Edmondson v. International Playtex, Inc.*, 678 F.Supp. 1571 (N.D.Ga. 1987); *Staggs v. Chrysler Corp.*, 678 F.Supp. 270 (N.D.Ga.1987). The defendant contends it is entitled to summary judgment on the plaintiff's claim that the accident was caused by the defendant's operation of the train at a speed greater than reasonable based on federal preemption.

[3] It is well established that Congress, through the pervasive federal regulation of railroads in the Federal Railroad Safety Act of 1970 ("FRSA"), 45 U.S.C. § 421 *et seq.*, intended to establish nationally uniform railroad safety and preempt state regulation of railroads. *See Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108 (5th Cir.1976). The FRSA specifically controls the speed at which trains may operate by classifying sections of track and assigning to each classification a maximum speed limit. The track in question is classified as class four track and, according to federal regulations, the maximum train speed for class four track is 60 miles per hour. Based on the pervasive na-

ture of federal regulation of the subject area the court finds that train speed is expressly preempted by federal law. Moreover, the court further finds that because there is no evidence that the train exceeded this federal standard, any common law or statutory negligence claim based on the train's speed is preempted by federal law. See *Sisk v. National Railroad Co.*, 647 F.Supp. 861, 865 (D.Kan.1986).

[4] Similarly, the court finds that the plaintiff's claim that the defendant was negligent in failing to install gate arms at the Cook Street crossing is preempted by federal law. Public agencies having jurisdiction over railroad crossings have the authority to select appropriate traffic control devices. *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149, 1154 (9th Cir.1983). That is, federal authority to regulate railroad crossings has been delegated to local agencies whose decisions then constitute federal decisions and have a preemptive effect. *Id.* In early 1980 the Georgia Department of Transportation ("DOT"), acting pursuant to federally delegated authority, evaluated railroad crossings in the Cartersville area and determined the warning devices necessary for the various crossings. Initially, DOT determined that gate arms should be installed at the Cook Street crossing, but the funds earmarked for this crossing were later transferred to other projects. The decision to install gate arms at the Cook Street crossing was placed on a list of projects to be considered at a later time.

Based on this evidence, the court finds that DOT made a decision not to install gate arms at the Cook Street crossing when it transferred the funds to other projects and removed the Cook Street crossing from the list of crossings to receive gate arms. Accordingly, DOT's determination constitutes a federal decision in accordance with federal law, and the plaintiff's claim that the defendant was negligent in not providing gate arms is preempted.

[5] In moving for reconsideration of the grant of summary judgment the plaintiff argues that there is a genuine issue of fact as to whether the warning devices at the Cook Street crossing malfunctioned at the time of the accident. The plaintiff generally contends that the automatic warning devices at the crossing malfunctioned often and malfunctioned at the time of the accident.

Based on the evidence properly before the court, however, the court finds that there is no issue of material fact concerning the functioning of the automatic warning devices. The defendant has presented affirmative evidence that immediately after the accident the signal lights were tested and were in working order. Kelly Deposition at 11. Furthermore, the undisputed testimony of Helen Stephenson, the motorist directly behind Easterwood as he turned onto Cook Street and proceeded through the crossing, establishes that the lights were operating and visible at the time of the accident and the train horn sounded.

In contrast, the plaintiff's evidence purporting to create a factual issue for trial consists of witness statements that they do not recall seeing the flashing warning light. Such evidence must give way to the defendant's direct and positive testimony that the warning devices were functioning at the time of the accident. Accordingly, the defendant is entitled to summary judgment on this claim.

[6] The plaintiff's final contention is that the defendant was negligent in allowing vegetation to grow along the side of the track thus preventing Easterwood from seeing the oncoming train and because there was a "hump" on the crossing which distracted motorists. Totally absent from the record, however, is any evidence that the vegetation or hump played a part in this incident. Moreover, the plaintiff has produced no evidence that the alleged vegetation was within the defendant's control.

Based on the foregoing, the defendant's Motion for Summary Judgment is GRANTED, the plaintiff's Motion for Reconsideration is DENIED, and the plaintiff's Motion to Supplement the Record is DENIED.

SO ORDERED.

Appendix C

Order of The United States Court of Appeals On Petition for Rehearing and Suggestion of Rehearing En Banc

THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 90-8851

MRS. LIZZIE BEATRICE EASTERWOOD,
Plaintiff-Appellant,
verus
CSX TRANSPORTATION, INC.,
Defendant-Appellee.

On Appeal from the United States District Court for the
Northern District of Georgia.

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion July 20, 11th Cir., 1991, ___ F.2d ___).

Before: JOHNSON and COX, Circuit Judges, and
HENDERSON, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

Frank M. Johnson, Jr.
United States Circuit Judge

3

IN THE

Supreme Court, U.S.

JAN 24 1992

OFFICE OF THE CLERK

Supreme Court of the United States

OCTOBER TERM, 1991

NO. 91-790

CSX TRANSPORTATION, INC.,

Petitioner,

vs.

Mrs. Lizzie Beatrice EASTERWOOD,

Respondent.

**RESPONSE TO PETITION FOR
WRIT OF CERTIORARI TO THE
UNITED STATES SUPREME COURT**

JAMES I. PARKER, ESQ.
TAMBRA PANNELL COLSTON, ESQ.
WILLIAM L. LUNDY, Jr., ESQ.

PARKER & LUNDY
POST OFFICE BOX 1018
CEDARTOWN, GEORGIA 30125
404/748-5643

QUESTIONS PRESENTED

- I. WHETHER THE COMMON-LAW RULE REQUIRING A RAILROAD TO MAINTAIN A SAFE CROSSING BY PLACING ACTIVE WARNING DEVICES IN A HAZARDOUS AREA IS PREEMPTED BY THE FEDERAL RAILROAD SAFETY ACT WHICH ONLY ALLOWS FOR RULES REGULATING THE USE OF FEDERAL MONEY?

IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

NO. **91-790**

CSX TRANSPORTATION, INC.,
Petitioner,

vs.

Mrs. Lizzie Beatrice EASTERWOOD,
Respondent, Cross Petitioner.

**RESPONSE TO PETITION FOR CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

Respondent urges the Court to deny Petitioner, CSX's Writ of Certiorari on the issue of whether the Eleventh Circuit was correct in unholding the Railroad's common-law duty to maintain a safe crossing.

TABLE OF CONTENTS

Questions Presented	i
Table of Contents	iii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	1
Constitutional Provisions and Statutes involved	1
Statement of the Case	3
Reasons for Denying Petitioner's Writ	5
I. THE DECISION OF THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT WHICH UPHOLDS THE COMMON- LAW RULE REQUIRING A RAILROAD TO MAINTAIN A SAFE CROSSING DOES NOT CONFLICT WITH, NOR EVEN AFFECT THE FEDERAL SCHEME TO PROMOTE RAILROAD CROSSING SAFETY 5	
A. The Legislative history reveals that congress' concern with rail- road crossing safety is limited to studying the grade crossing problem and providing federal funds 5	
B. The State's role in providing grade crossing protection is limited to identifying those crossings which should receive federal funds and insuring that the devices qualify for those funds 6	
C. The decision below does not CREATE a conflict in the circuits 8	

TABLE OF AUTHORITIES

United States Supreme Court

<i>Silkwood v. Kerr-McGee Corp.</i> , 464 U.S. 238, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984)	8
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United States Court of Appeals

<i>Easterwood v. CSX Transportation Inc.</i> , 933 F.2d 1548 (11th Cir. 1991)	7
<i>Karl v. Burlington Northern</i> , 880 F.2d 68 (8th Cir 1989)	passim
<i>Marshall v. Burlington Northern Railroad Inc.</i> , 720 F.2d 1149 (9th Cir. 1983)	8

District Court Opinions

<i>Armijo v. Atchison, Topeka & Sante Fe Railway Co.</i> , 754 F.Supp 1526 (D.N.M. 1990)	8, 9
<i>Carson v. Burlington Northern Railroad</i> , No. CV 89-0-513 (D.C. Neb. 7/5/90)	9
<i>McMinn v. Consolidated Rail Corp.</i> , 716 F.Supp 125 (N.J. 1989)	8
<i>Nixon v. Burlington Northern Railroad Inc.</i> , No. CV85-384-BLG (D. Mont., 4/2/88)	8

State Decisions

<i>Runkle v. Burlington Northern Railroad</i> , 613 P.2d 982 (Mont. 1980)	7, 9
--	------

Statutes and Constitutional Provisions

23 U.S.C. Sec. 130	6
45 U.S.C. Sec. 421	passim
45 U.S.C. Sec. 434	11

OPINIONS BELOW

The opinion of the Court of Appeals dated June 20th, 1991 is reported at 933 F.2d 1548 and appears in the appendix of Petitioner's petition for certiorari. The opinion of the District Court dated August 8, 1990, reported at 742 F.Supp 676 is also found in the appendix of Petitioner's petition for certiorari. The Order of the Court of Appeals for the Eleventh Circuit dated August 20, 1991, denying Petitioner's petition for rehearing and suggestion for rehearing en banc appears in the appendix to Petitioner's petition for certiorari.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered June 20, 1991. A petition for rehearing filed by Petitioner herein, was denied on August 20, 1991 and Petitioner filed its Petition for Certiorari on November 15, 1991. Respondent filed this, her response within 30 days of receipt of Petitioner's Petition for Certiorari as provided for in S. Ct. R. 12.3.¹ This Court's jurisdiction is invoked under 28 U.S.C.A. Sec. 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The United States Constitution states in Article VI, Clause 2"

This Constitution, and the Laws of the United States, which shall be made in Pursuance thereof . . . shall be the supreme law of the Land;

¹ The original response to the Petition was timely filed on December 16, 1991. Because Respondent was in error in filing her cross-petition with in the same document, this is being resubmitted at this time.

Section 101 of the Federal Railroad Safety Act, 45 U.S.C. Sec. 421 provides:

The Congress declares that the purpose of this Act is to promote safety in all areas of railroad operations and to reduce railroad related accidents, and to reduce deaths and injuries to persons, and to reduce damage to property caused by accidents involving any carrier of hazardous materials.

Section 205 of the Federal Railroad Safety Act, 45 U.S.C. Sec. 434, provides:

The Congress declares that laws, rules, regulations, orders and standards relating to railroad safety shall be nationally uniform to the extent practicable. A state may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such state requirement. A state may adopt or continue in force an additional or more stringent law, rule, regulation, order or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

Section 213.1 of the Code of Federal Regulations, 49 C.F.R. 213.1 provides:

This part prescribes initial minimum safety requirements for railroad track that is part of the general railroad system of transportation. The requirements prescribed in this part apply to specific track conditions existing in isolation. Therefore, a combination of track conditions, none of which individually amounts to a deviation from the requirements of this part, may require remedial action to provide for safe operations over that track.

STATEMENT OF THE CASE

A. Procedural Background

The underlying case is a wrongful death action for recovery of damages for the death of Thomas Ray Easterwood which occurred on February 24, 1988. The original action was filed by decedent's wife in the United States District Court for the Northern District of Georgia on June 3, 1988. The District Court's jurisdiction was invoked under diversity of citizenship.

The case was set for trial for December 30, 1989. On December 19th Petitioner, CSX, filed its motion for summary judgment contending for the first time that plaintiff's claims were preempted by the Federal Railroad Safety Act of 1970. The District Court granted CSX's motion for summary judgment on August 8, 1990 on the issues of preemption and further found that there were no material issues of fact to be determined by a jury on Plaintiff's non-preempted claims.

Mrs. Easterwood filed her Notice of Appeal to the 11th Circuit Court of Appeals on September 6, 1990. On June 20, 1991 the Court of Appeals upheld the District Court's order finding that the question of whether the defendant failed to travel at a safe and prudent speed was preempted by the Federal Railroad Safety Act and reversed the District Court on all other issues. The 11th Circuit correctly held that Mrs. Easterwood's claim that the Railroad failed to maintain a safe crossing was not preempted by the Federal Railroad Safety Act and there are numerous material issues of fact remaining which are not preempted.

Petitioner, CSX, filed its motion for rehearing and suggestion for rehearing en banc which was denied by the 11th Circuit on August 20, 1991. CSX then filed its Petition for Certiorari to this Honorable Court on November 15, 1991.

B. Factual Background

On the morning of February 24, 1988, Mr. Thomas Easterwood arrived at his job of nineteen years at Duncan Wholesale in Cartersville, Georgia, where he worked as a delivery truck driver. He loaded his long bed International truck with various products and left for his first delivery.

February 24th was a cold, clear winter morning when at 8:52 a.m. Mr. Easterwood came upon the Cook Street Railroad Crossing. He was driving slowly and carefully east toward the crossing at a speed of about 10 miles per hour, with the morning sun shining on his windshield. A CSX engine was running backward pulling one car along the railroad track at this same time. The train approached the Cook Street crossing at a speed of between 32 and 50 miles per hour.

Mr. Easterwood attempted to negotiate this dangerous crossing in his long bed truck apparently unaware of the oncoming train. The flashing lights and bells activated just a moment before Mr. Easterwood passed under them and he was killed by the Petitioner's train.

This railroad crossing has been the scene of at least seven prior collisions since 1981. There are numerous problems with this crossing such as a curve in the tracks just north of Cook Street which allows only 150 feet of sight distance for a motorist looking up the track. Problems exist also because of the amount of vegetation allowed to grow along the side of the track, frequently malfunctioning signals which produce false warnings, and a hump in the crossing which make the tracks difficult for drivers of large trucks to maneuver. This is a heavily traveled crossing, as it lies very close to the heart of Cartersville, Georgia, and the tracks run parallel to one of the City's busiest streets. Due to the numerous hazards at this crossing and the large number of motorists who traverse the crossing, cross-petitioner charges the railroad with negligence also, in failing to reduce its speed to a speed which is reasonable and prudent under the circumstances.

REASONS FOR DENYING PETITIONER'S WRIT

I. THE DECISION OF THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT WHICH UPHOLDS THE COMMON-LAW RULE REQUIRING A RAILROAD TO MAINTAIN A SAFE CROSSING DOES NOT CONFLICT WITH NOR EVEN AFFECT THE FEDERAL SCHEME TO PROMOTE RAILROAD CROSSING SAFETY.

Contrary to Petitioner's contentions and statements, neither the Federal Railroad Safety Act nor any of the other acts cited by Petitioner, contain any express preemption of Mrs. Easterwood's claim for damages arising out of the Railroad's failure to install gate arms at the Cook Street Crossing. Petitioner urges this Court as it did the Court below that the Federal Railroad Safety Act preempts state common law negligence claims in almost every area. Petitioner fails to state however, exactly how the F.R.S.A. accomplishes this. The acts cited only require the Secretary of Transportation to study the grade crossing problem.

Petitioner bases its argument that the F.R.S.A. expressly preempts a common law claim for negligence on two congressional acts. It urges this court to find that the Federal Aid Highway Act and the Surface Transportation Act constitute regulations promulgated by the Secretary of Transportation and therefore according the language of the F.R.S.A., preempt the state common-law. These two acts however, address only studies and funding.

A. *The legislative history reveals that Congress's concern with railroad crossing safety is limited to studying the grade crossing problem and providing federal funds.*

Senate report 91-619 on the proposed act, originally entitled the "Railroad Safety and Research Act of 1969" emphasized that the scope of federal involvement in grade crossing safety is only to the extent of "sufficient funds" available to promulgate programs that address the hazards of grade crossings. The report characterizes the Secretary's power under this act to help eliminate hazards only to the extent of the available

federal funds. Congress then authorized the Secretary to study the grade crossing problem. Congress was extremely concerned with the grade crossing problem but more concerned with the lack of resources available to help the railroads eliminate the hazards.

Grade crossing safety receives attention from highway authorities as well as railroad organizations. Under existing law, Federal-aid highway funds may be used on grade crossings on the Federal-aid highway system. This includes interstate, primary, and secondary roads which together account for slightly more than 20 percent of the total number of crossings. However, Federal funds may not be used to reduce hazards at railroad crossings of city streets and on many state supplementary highways and local roads which are not on the Federal-aid system and which represent the remaining 80 percent of the total. A certain number of safety improvements are being made currently by the carriers and State and local agencies on crossings not on the Federal-aid system. There is an imperative need for an expanded public program to cover these crossings in order to reduce immediately this extremely high fatality rate. Senate Report No. 91-619.

As a result of the Secretary's study, Congress amended the Highway Safety Act in 1973, at 23 U.S.C. Sec. 130 to require the states to survey all crossings and prioritize them to insure that the most dangerous crossings receive the available Federal Funds.

B. *The State's role in providing grade-crossing protection is limited to identifying those crossings which should receive federal funds and insuring that the devices qualify to receive those funds.*

Petitioner argues that because the State has a role in surveying and scheduling projects to receive federal funds and must ultimately approve active protection devices, any state common-law claim is preempted. If a common-law claim were at issue here that sought to place responsibility on the railroad for failure to survey or schedule a project to be the recipient of federal funds, Petitioner's claim might have merit. That is not the case.

Petitioner seizes on the language that the State must "approve" the upgraded warning device to justify its position that the Railroad is relieved of the responsibility of maintaining a safe crossing.

The State's only role with regard to approval however, is to decide whether the active protection device is in conformity with the Manual on Highway Traffic Control Devices. The Manual sets forth the minimum standards necessary for any traffic control device that is installed with federal money. It is important to note however, that adoption of the Manual is not required, but failing to adopt the Manual may result in a loss of federal funds. The Manual does not lessen the Railroad's responsibility. The railroad company still bears the responsibility for design, installation and maintenance.

The Manual on Uniform Traffic Control Devices is not the law, but merely the standard or the norm. It does not determine the responsibility of the Railroad. *Runkle v. Burlington Northern Railroad*, 613 P.2d 982 (Mont. 1980). The act only represents an effort by the Federal Government to improve the safety at grade crossings but does not lessen the existing duty on the railroad to maintain a good and safe crossing *Karl v. Burlington Northern Railroad Co.*, 880 F.2d 68 (8th Cir. 1989). There is no law, state or federal, which would prevent the Railroad from deciding that an active warning device is needed and paying the full cost of that device.

As the Circuit Court correctly noted, this set of regulations only allows the states to apply for Federal-aid to fund the improvements *Easterwood v. CSX Transportation Inc.*, 933 F.2d 1548 (11th Cir. 1991). The Court could find no express preemption of the grade crossing question. Neither could it find the necessary requirements to imply preemption as there is no conflict between allowing tort suits to go forward and building better railroad crossings.

As the Federal Railroad Safety Act has as its stated purpose the promotion of safety and the reduction of deaths and injuries in railroad related accidents 45 U.S.C. Sec. 421, it would be counter productive for it to supplant the most effective method the law has developed to control negligent behavior, that being the common law. Because this Court

has already decided that there should be no preemption unless congress expressly supplants the common-law and the two laws conflict, certiorari on this issue should not be granted *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 104 S.Ct. 615, 78. L.Ed. 443 (1984).

C. The decision below does not CREATE a conflict in the Circuits.

Petitioner implies that the Decision of the Eleventh Circuit is against all authority except that of the eighth Circuit in *Karl v. Burlington Northern Railroad Co.*, 880 F.2d 68 (1989) and relies heavily on the 1983 decision in *Marshall v. Burlington Northern Railroad Co.*, 720 F.2d 1149 (9th Cir. 1983) and *Armijo v. The Atchison, Topeka & Santa Fe Railway Co.*, 754 F.Supp. 1526 (D.N.M. 1990). *Marshall* was one of the first cases to present the problem to the courts and was the very first to receive appellate review. The Court in *Marshall* held that the railroad's common-law duty to maintain a safe crossing is preempted when the State has made a decision on which warning device to use. Until the State's decision is made, the Railroad still has the responsibility. *Nixon v. Burlington Northern Railroad Co.*, No CV-85-384-BLG (1988 U.S. Dist. Lexis 16477) (D.Mont. 4/2/88) followed *Marshall* as it was the only appellate decision at the time.

It is true that several courts have followed the *Marshall* decision but several others have followed the reasoning of *Karl* cited above. Taking *Marshall* to its logical conclusion would mean that once a state determines that gate arms are needed at a hazardous crossing, the railroad could no longer be held negligent for failure to install them. What then would be the incentive for installing the device? If liability ceases once the state makes the decision, the Railroad would be immune from suit whether they actually installed the warning device or not.

The F.R.S.A. sets forth no federal remedy for a Railroad's failure to comply with a State recommendation. Neither has it been found to imply a right of action. All victims of the railroad's failure to complete the project would be left without any remedy.

The F.R.S.A. provides no federal remedy because neither Congress nor the Secretary of Transportation ever contemplated the argument now being propounded to the Courts. The 8th Circuit in *Karl v. Burlington Northern Railroad Co.*, 880 F.2d 68 (1989) apparently recognized the problems with the ruling in *Marshall*. *Karl* cited *Runkle v. Burlington Northern Railroad Co.*, 613 p.2d 982 (Mont. S.C. 1980) and held that the F.R.S.A. only represents an effort by the Federal Government to improve the safety at grade crossings but does not lessen the existing duty on the railroad to maintain a good and safe crossing. The same result was reached in *McMinn v. Consolidated Rail Corp.*, 716 F.Supp 125 (N.J. 1989) and *Carson v. Burlington Northern Railroad Co.*, No. 89-0-513 (D.C. Neb. 7/5/90). These decisions which reject the Railroad's argument are not cited by Petitioner.

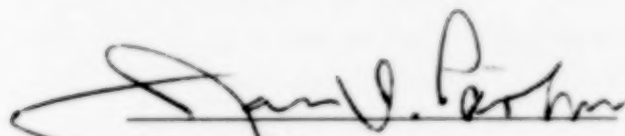
Petitioner cites the case of *Armijo v. The Atchison, Topeka & Santa Fe Railway Co.*, 754 F. Supp. 1526 (D.N.M. 1990) where the District Court found that Plaintiff's claims were expressly preempted. The *Armijo* Court however noted in its decision that Plaintiff failed to dispute Defendant's undisputed material fact that the F.R.S.A. expressly preempted the State law. The Eleventh Circuit was not faced with so simple a problem. Respondent has vigorously disputed that her claims are preempted by Federal Law. The Eleventh Circuit analyzed the decisions cited by Petitioner and Respondent and chose to follow the reasoning of the Courts that have found no preemption of Respondent's common-law claims. Respondent cannot argue that there is not a conflict in the lower courts. That conflict however, was not created by the case at bar. This case helps resolve the conflict by being the third appellate decision and the one which will constitute the weight of authority. Since this issue was correctly decided by the Eleventh Circuit there is no need for Supreme Court Review at this time.

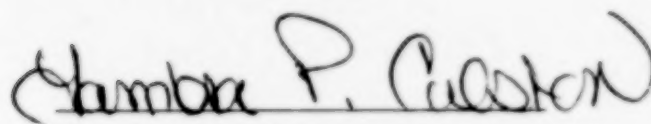
CONCLUSION

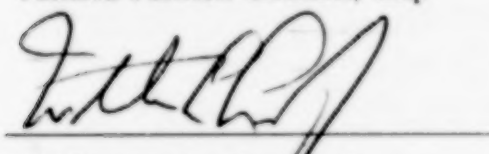
For the above and foregoing reasons, Respondent respectfully requests the Court to DENY the petition with regard to the Petitioner's contention that the Railroad's duty to maintain a safe crossing is preempted.

January 24, 1992

Respectfully Submitted,


James I. Parker, Esq.
Counsel of Record


Tandra Pannell Colston, Esq.


William L. Lundy, Jr., Esq.
PARKER AND LUNDY
Post Office Box 1018
Cedartown, Georgia 30125
404/748-5643

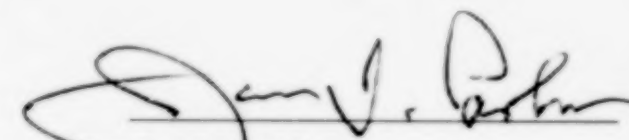
CERTIFICATE OF SERVICE

I, James I. Parker, Counsel for Respondent, Cross Petitioner, herein and a Member of the Bar of the Supreme Court of the United States, hereby Certify that I have on this date served three true and correct copies of the foregoing Response on Counsel for Petitioner by placing same in the United States Mail with sufficient postage affixed thereto and addressed to the following:

Mr. Jack Senterfitt
Mr. Richard T. Fulton
Alston & Bird
1201 West Peachtree Street, N.W.
Atlanta, Georgia 30309-3424

I further certify that all parties required to be served, have been served.

January 24, 1992


James I. Parker
Counsel for Respondent

4
No. 91-790

Supreme Court, U.S.

FILED

FEB 27 1992

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CSX TRANSPORTATION, INC.,

Petitioner,

v.

LIZZIE BEATRICE EASTERWOOD,

Respondent.

**ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT**

PETITIONER'S REPLY BRIEF

JACK H. SENTERFITT*

RICHARD T. FULTON

JAMES W. HAGAN

ALSTON & BIRD

One Atlantic Center

1201 West Peachtree Street

Atlanta, Georgia 30309-3424

(404) 881-7000

Counsel for Petitioner

**Counsel of Record*

February 27, 1992

IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

CSX TRANSPORTATION, INC.,
Petitioner,

v.

LIZZIE BEATRICE EASTERWOOD,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

JACK H. SENTERFITT*
RICHARD T. FULTON
JAMES W. HAGAN

ALSTON & BIRD
One Atlantic Center
1201 West Peachtree Street
Atlanta, Georgia 30309-3424
(404) 881-7000

Counsel for Petitioner
**Counsel of Record*

February 27, 1992

LIST OF PARTIES

Pursuant to Court Rule 29.1, Petitioner respectfully refers the Court to the list of parties contained in the Petition for Writ of Certiorari previously filed. The only amendment to this listing is the addition of the *amicus curiae* in support of Petitioner, the Association of American Railroads.

TABLE OF CONTENTS

	Page
LIST OF PARTIES	i
TABLE OF AUTHORITIES	iii
REPLY ARGUMENT.....	1
I. THE FRSA AND THE SECRETARY'S GRADE CROSSING REGULATIONS AL- LOCATE REGULATORY RESPONSIBILITY, NOT MERELY FEDERAL FUNDS.....	2
II. RESPONDENT ACKNOWLEDGES THE NEED FOR PLENARY REVIEW OF THE ISSUES PRESENTED.....	6
CONCLUSION.....	7

TABLE OF AUTHORITIES

Cases:	Page No.
<i>CSX Transp., Inc. v. Public Utils. Comm'n</i> , 701 F. Supp. 608 (S.D. Ohio 1988), <i>aff'd</i> 901 F.2d 497 (6th Cir. 1990), <i>cert. denied</i> , 111 S.Ct. 781 (1991).....	4
<i>Easterwood v. CSX Transp., Inc.</i> , 742 F. Supp. 676 (N.D. Ga. 1990)	2
<i>Easterwood v. CSX Transp., Inc.</i> , 933 F.2d 1548 (11th Cir. 1991).....	2
<i>Marshall v. Burlington Northern, Inc.</i> , 720 F.2d 1149 (9th Cir. 1983).....	5
<i>National Ass'n. of Regulatory Utils. Comm'rs. v.</i> <i>Coleman</i> , 542 F.2d 11 (3d Cir. 1976)	3
<i>Rayner v. Smirl</i> , 873 F.2d 60 (4th Cir.), <i>cert. denied</i> , 493 U.S. 876 (1989)	3, 6

STATUTES AND REGULATIONS:

Federal Acts and Statutes:

45 U.S.C. §431	2
45 U.S.C. §433(b).....	2, 3, 4
45 U.S.C. §434	2, 3, 4

Federal Regulations:

23 C.F.R. Part 646	3
23 C.F.R. Part 655	3
23 C.F.R. Part 924	3
49 C.F.R. §1.48(o).....	3

OTHER AUTHORITIES:

H.R. Rep. No. 1194, 91st Cong., 2d Sess. 11, reprinted in 1970 U.S. Code Cong. & Admin. News 4104.....	3
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Respondent's brief in opposition proceeds from two fundamentally flawed premises. First, Respondent erroneously asserts that the Federal Railroad Safety Act ("FRSA") does not expressly preempt the state law claim at issue because it only directs the Secretary of Transportation to "study" grade crossing safety. The corollary to this assertion, equally misguided, is Respondent's claim that the Secretary's grade crossing regulations merely allocate federal funds to crossing improvement projects. Second, while Respondent acknowledges a broad

division of authority on the issue framed by the Petition, Respondent contends that this conflict is unimportant since it preexisted the panel's decision below.¹

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THE FRSA AND THE SECRETARY'S GRADE CROSSING REGULATIONS ALLOCATE REGULATORY RESPONSIBILITY, NOT MERELY FEDERAL FUNDS

In order to characterize the FRSA as only a "study and funding" statute, Respondent ignores the Act's plain language and convincing legislative history to the contrary. The FRSA *explicitly* directs the Secretary to prescribe, as necessary, appropriate rules and regulations for *all* areas of railroad safety. 45 U.S.C. § 431. The FRSA also *requires* the Secretary to develop *and* implement solutions to the "grade crossing problem" under *both* FRSA authority and the Secretary's authority over highway and traffic safety. 45 U.S.C. § 433(b). Finally, and most remarkably, Respondent's truncated interpretation of the FRSA ignores *in toto* 45 U.S.C. § 434, an express preemption provision which unequivocally nullifies state law control over any area of rail safety addressed in regulations issued by the Secretary. Numerous decisions by federal courts of

¹ Petitioner also strongly disputes Respondent's statement of the case and facts. Respondent's suggestion that the preemption issues herein were only first raised on the eve of trial is incorrect. Both the trial court and the Eleventh Circuit summarily rejected this implicit claim of prejudice. *Easterwood v. CSX Transp., Inc.*, 742 F. Supp. 676, 677 (N.D. Ga. 1990); *Easterwood v. CSX Transp. Inc.*, 933 F.2d 1548, 1551 (11th Cir. 1991). Additionally, Respondent's factual narrative is devoid of record citation and refers repeatedly to non-record, inadmissible evidence submitted without excuse *after* oral argument in the trial court. The trial court properly refused to consider this untimely material, *Easterwood*, 742 F. Supp. at 677, and its use in this proceeding should not be countenanced.

appeal, all ignored by Respondent, have stated that Section 434 evinces a "total preemptive intent" by Congress over *all* areas of rail safety addressed in federal regulations. See, e.g., *National Ass'n of Regulatory Utils. Comm'rs v. Coleman*, 542 F.2d 11, 13 (3d Cir. 1976); *Rayner v. Smirl*, 873 F.2d 60, 65 (4th Cir.), *cert. denied* 493 U.S. 876 (1989); see also, *Petition*, p. 12 n.1 (collecting cases).

Beyond this transparent effort to rewrite the FRSA, Respondent also avoids a clear record of legislative intent to promote rail safety through the implementation of nationally uniform rules and regulations. In contrast to Respondent's fragmented citation to inapplicable legislative history, the Petition and Brief *amicus curiae* recite abundant and compelling evidence of Congress' intent to implement a federally uniform solution to the grade crossing problem, not merely to study and fund possible remedies. Indeed, the FRSA House Report described crossing accidents as a major rail safety problem that required an immediate regulatory "attack" and necessitated a "coordinated" effort by the Secretary to develop and implement solutions "under this act and pursuant to his authority over highway, traffic, and motor vehicle safety...." H.R. Rep. No. 1194, 91st Cong., 2d Sess. *reprinted in* 1970 U.S.C.C.A.N., 4104, 4116. In short, both the FRSA and its legislative history reflect with unmistakable clarity Congress' directive that the Secretary implement a federally uniform solution in this area of rail operations using "coordinated" and multi-statute sources of regulatory authority. 45 U.S.C. § 433(b).

As required by the FRSA, the Secretary issued uniform regulations addressing the improvement of grade crossings pursuant to FRSA *and* highway safety authority. See 49 C.F.R. § 1.48(o); 23 C.F.R. Parts 646, 655, 924. These

regulations represent exactly the "coordinated" effort mandated by the FRSA in 45 U.S.C. § 433(b). Because Congress explicitly sanctioned a coordinated regulatory effort under *both* railroad *and* traffic safety sources of authority, Section 434 of the FRSA encompasses the Secretary's grade crossing regulations within its expressly preemptive scope and bars Respondent's attempt to invoke state law regulation of the same issue. See *CSX Transp., Inc. v. Public Utils. Comm'n*, 901 F.2d 497 (6th Cir. 1990), *cert. denied*, 111 S.Ct. 781 (1991) (FRSA preemption relates to *all* regulations regarding rail safety issued by the Secretary). In holding to the contrary, the panel below erroneously interpreted the Secretary's regulatory authority under the FRSA and failed to acknowledge Congress' stated intent that the Secretary employ diverse sources of authority to address this unique area of rail safety.

While Respondent may debate the wisdom of Congress' decision to improve rail safety through nationally uniform regulations which treat crossing safety as a traffic-control problem, Respondent cannot contest the efficacy of the scheme Congress created. See *Petition* at 6-7. These regulations, fully described in the Petition, define precisely the specific criteria for selecting, and the railroads' lack of authority and responsibility for choosing, appropriate methods of traffic-control at crossings. Respondent's assertion that the Secretary's regulations are only a means for states to access federal funds cannot be reconciled with either the substance of the regulations or Justice Kennedy's ruling while on the Ninth Circuit that the Secretary "delegated federal authority to regulate grade crossings to local agencies." *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149, 1154 (9th Cir. 1983). Not only do the Secretary's regulations preemptively address every

aspect of selecting appropriate traffic-control at crossings, they clearly reflect a shift of responsibility for making these traffic-safety decisions from private railroads to public transportation agencies. As *Marshall* recognizes, the Secretary's regulations allocate *responsibility*, not simply federal funds.

Equally suspect is Respondent's claim that neither the FRSA nor the federal crossing regulations prohibit railroads from unilaterally installing traffic-control devices at crossings. Respondent attempts to equate the absence of authority prohibiting conduct as implicit authority for allowing juries to require such conduct and, in Respondent's view, improve rail safety through the threat of haphazard, *post hoc* damage awards. This argument, hardly persuasive under any circumstance, is particularly specious in the face of express preemption under an explicit federal statute enacted to eliminate dual federal-state control over areas addressed by federal regulations. The entire thrust of the Secretary's regulations is the implementation of a uniform approach to improving traffic safety at crossings. The entities in the best position to determine the safety needs of the travelling public — the state and local agencies with jurisdiction over the roadway — are the exact entities charged with delegated federal authority to select appropriate traffic-control devices under federally uniform standards. While railroads have a significant role in implementing the traffic-safety decisions reached by these agencies under federal criteria, railroads have no authority to subvert this preemptive and effective federal scheme by unilaterally creating private or competing systems for the evaluation and improvement of crossings without regard to the Secretary's comprehensive body of federal regulation. Indeed, this is exactly the multifarious and haphazard system of regulation

Congress sought to avoid in enacting the FRSA. See *Rayner*, 873 F. 2d at 66.

II

RESPONDENT ACKNOWLEDGES THE NEED FOR PLENARY REVIEW OF THE ISSUES PRESENTED IN THE PETITION.

Respondent's brief clearly acknowledges a broad and growing conflict between the circuits and lower courts on the issues framed by the Petition. Respondent attempts to minimize this conflict by stating that it was not "created" by the case at bar. *Brief in Opp.*, at 9. This curious distinction between the "creation" and "existence" of a conflict between the circuits does not diminish the immutable national importance, substantiality, and recurring nature of these questions.² Indeed, the issues raised in the Petition have generated a discordant body of opinion that renders the need for plenary review indisputable.

² Now, as in the Eleventh Circuit, Respondent repeatedly makes the distorted claim that a finding of FRSA preemption in this case would absolve railroads of all negligence liability. *Brief in Opp.*, at 5,8. Petitioner has never urged this sweeping immunity from liability as Respondent claims and, in fact, the narrow issues before this Court do not implicate Respondent's hyperbolic concerns. The question, simply stated, is whether preemptive federal regulations, specifying that public authorities, not railroads, have the duty and responsibility to evaluate and improve traffic safety at crossings, bar state law regulation to the contrary.

CONCLUSION

For all of the foregoing reasons, as well as those set forth in the Petition, this Court should grant certiorari to review the decision below.

Respectfully submitted,

JACK H. SENTERFITT*
RICHARD T. FULTON
JAMES W. HAGAN

February 27, 1992

Counsel for Petitioner
*Counsel of Record

ALSTON & BIRD
1201 West Peachtree Street
Atlanta, Georgia 30309-3424
(404) 881-7000

6
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*JACK H. SENTERFITT
RICHARD T. FULTON
JAMES W. HAGAN
ALSTON & BIRD
1201 West Peachtree Street
Atlanta, Georgia 30309-3424
(404) 881-7000
Counsel for Petitioner
*Counsel of Record

March 13, 1992

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JAMES W. HAGAN -
ALSTON & BIRD
1201 West Peachtree Street
Atlanta, Georgia 30309-3424
(404) 881-7000
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*Counsel of Record

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SUPPLEMENTAL ARGUMENT

On March 6, 1992, the United States Court of Appeals for the Tenth Circuit held that the Federal Railroad Safety Act ("FRSA") expressly preempts the state law imposition of a duty on railroads to select traffic-control devices at grade crossings. The Tenth Circuit stated that "a railroad cannot be liable in common law negligence for failure to provide adequate safety devices at a grade crossing." *Hatfield v. Burlington Northern R.R.*, No. 91-3158, slip op. at 11 (10th Cir. March 6, 1992) (reprinted in the Appendix hereto). This recent decision directly conflicts with the Eleventh Circuit's ruling herein.

In *Hatfield*, the crossing was marked only by a passive crossbuck sign, prompting the argument that the railroad had a state law duty to install additional traffic-control devices.

Slip op. at 2. Respondent herein makes the identical argument even though the crossing involved was equipped with six active red-flasher warning lights pursuant to federal regulations. In both instances, a state law duty on railroads is urged despite preemptive federal regulations allocating this duty to select appropriate traffic-control devices to state and local transportation authorities with jurisdiction over the roadway in question. The Tenth Circuit, unlike the Eleventh Circuit, properly recognized that these federal regulations absolved railroads of any duties imposed by state law regarding the selection of traffic-control devices at grade crossings. Slip op. at 11. In acute contrast to its sister court, the Tenth Circuit was sufficiently compelled by the trail court's refusal to grant the railroad summary judgment on this claim that it granted interlocutory review and reversed.

The Tenth Circuit expressly rejected the notion that FRSA preemption does not occur until state and local transportation authorities reach a decision pursuant to federal criteria for the specific crossing in question. *Hatfield*, slip op. at 10. *Hatfield* correctly held that preemption occurred when the Secretary of Transportation adopted federal regulations which specify that appropriate transportation officials, not the railroad, shall select warning devices as part of a comprehensive traffic engineering approach to crossing safety:

The scheme enacted by Congress did not anticipate that the effect of the standard [shifting responsibility from railroads to state and local transportation authorities] was to be deferred or made selectively applicable for each grade crossing in the United States. To the contrary,

once the Secretary adopted the standard, its superseding effect became uniform throughout the nation.

Id. As such, *Hatfield* flatly contradicts the Eleventh Circuit's determination herein that federal grade crossing regulations do not preempt the imposition of a state law duty on railroads to select traffic-control devices at crossings. As judge Cabranes recently observed in granting summary judgment to the railroad in a similar case, the Eleventh Circuit's decision herein failed to give proper effect to federal grade crossing regulations which "vested exclusive responsibility for warnings and traffic control devices with the state Department of Transportation . . .," *Torres v. Consolidated R.R. Corp.*, No. 3:87-16 (JAC) (D. Conn. Dec. 4, 1991), slip op. at 2 (reprinted in the Appendix hereto).

CONCLUSION

The *Hatfield* and *Torres* decisions evidence a rapidly growing conflict in the circuits and lower courts on the issue framed in the Petition. As such, this Court should grant the Petition, resolve the conflict, and render an authoritative decision on an issue of significant importance to a vital component of our national transportation system. In the alternative, this Court should vacate the Eleventh Circuit's decision herein and remand the case for reconsideration in light of the Tenth Circuit's decision in *Hatfield*.

Respectfully submitted,

***Jack H. Senterfitt
Richard T. Fulton
James W. Hagan**

**ALSTON & BIRD
1201 West Peachtree Street
Atlanta, Georgia 30309-3424
(404) 881-7000
Counsel for Respondent
*Counsel of Record**

March 13, 1992.

APPENDIX

PUBLISH

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

FILED

United States Court of Appeals
Tenth Circuit

MAR 06 1992

ROBERT L. HOECKER
Clerk

No. 91-3158

ROBERT E. HATFIELD,

Plaintiff-Appellee,

v.

BURLINGTON

NORTHERN RAILROAD
COMPANY,

Defendant-Appellant.

**Appeal from the United States District Court
For the District of Kansas
D.C. No. 89-1529-K**

Phillip R. Fields, Wichita, Kansas, for Defendant-Appellant.

Timothy J. King (Terry S. Stephens, with him on the briefs) of Stinson, Lasswell & Wilson, Wichita, Kansas, for Plaintiff-Appellee.

Before MCKAY and MOORE, Circuit Judges, and ALLEY,
District Judge.*

MOORE, Circuit Judge.

*The Honorable Wayne E. Alley, United States District Court Judge for the Western District of Oklahoma, sitting by designation.

This is an interlocutory appeal under 28 U.S.C. § 1292 (b) from a decision denying Burlington Northern Railroad Company's motion for partial summary judgment on the issue of whether Robert E. Hatfield's common law negligence claim arising from a grade crossing collision is preempted by the Federal Railroad Safety Act. The district court held preemption had not occurred. *Hatfield v. Burlington Northern R.R. Co.*, 757 F. Supp. 1198 (D. Kan. 1991). We reach the opposite conclusion and reverse.

Plaintiff Hatfield filed a multi-claim complaint alleging the defendant Burlington Northern Railroad was negligent because, among other reasons, it did not install an active warning device at a grade crossing where a truck he was driving collided with one of Burlington's trains. At the time of the collision, the crossing was marked only by a standard crossbuck sign. Burlington moved for partial summary judgment on this claim, contending it has been preempted by the Federal Railroad Safety Act (FRSA), 45 U.S.C. § 421, and railroad safety rules, standards, and regulations adopted by the Secretary of Transportation.

The district court denied the motion. Analyzing the issue of preemption,¹ the court concluded Congress explicitly expressed an

¹ State law is preempted under the Supremacy Clause of the United States Constitution in three circumstances. *English v. General Elec. Co.*, 496 U.S. 72, ___, 110 S. Ct. 2270, 2275 (1990). First, Congress can define explicitly the extent to which its enactments preempt state law. *Id.* Second, a pervasive scheme of federal regulations may indicate congressional intent to occupy an entire field. Third, state law is preempted to the extent it actually conflicts with federal law. *Id.*

intent in FRSA § 434 to preempt the subject of adequate crossing warnings once the Secretary of Transportation has acted upon this subject,² but found no such action has occurred. Despite Burlington's argument that the Secretary took that action by adopting the Manual on Uniform Traffic Control Devices on Streets and Highways (MUTCD), the court held that preemption does not occur until a formal determination is made under the MUTCD of the exact type of warning device to be installed at the crossing. Following the district court's certification under 28 U.S.C. § 1292 (b), this appeal was taken.

We apply a de novo standard of review when considering a decision on summary judgment, *Barnson v. United States*, 816 F.2d 549, 552 (10th Cir.), cert. denied, 484 F.2d 896 (1987), and we use the same standard applied in the district court. *Osgood v. State Farm Mut. Auto Ins. Co.*, 848 F.2d 141, 143 (10th Cir. 1988). If no genuine issue of material fact exists, we determine if the

² Section 434 states in part:

The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary (of Transportation) has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

45 U.S.C. § 434 (emphasis added).

substantive law was correctly applied. *Applied Genetics Int'l., Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990). Because there are no disputed facts, the issue before us is ripe for summary determination.

II.

In 1970, with the adoption of FRSA, Congress required the Secretary of Transportation to study and develop solutions to problems associated with railroad grade crossings. 45 U.S.C. § 433(a) (1976). FRSA also directs the Secretary to address the grade crossing safety problem under his authority over highway traffic and safety. 45 U.S.C. § 433(b) (1976). Under the Highway Safety Act, 23 U.S.C. §§ 401-404 (1982), the Secretary has the responsibility to develop uniform standards and to approve state-designed highway safety programs as a condition precedent to the receipt by the state of federal highways funds. Through the Federal Highway Administration, the Secretary prescribed procedures to obtain uniformity in highway traffic control devices and adopted the MUTCD. 23 C.F.R. § 655.601 (1981).³

With this background, we begin our analysis by agreeing with the district court that § 434 of FRSA states an express preemption of state law. We also agree preemption does not occur until the Secretary adopts a rule, regulation, or standard covering the subject matter of the state law. Thus, we must determine whether any of the standards adopted by the Secretary cover the subject

³ Kansas has specifically adopted the MUTCD standards at Kan. Stat. Ann. § 8-2003 and Kan. Admin. Regs. 82-7-4(c) (1989).

matter of the duty to install active warning devices at railroad crossings where unusually dangerous conditions exist.⁴

III.

While this court has not addressed the question, it has arisen in other courts with mixed results. In *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149, 1154 (9th Cir. 1983), the court said:

The [MUTCD] prescribes that the selection of devices at grade crossing and the approval for federal funds is to be made by local agencies with jurisdiction over the crossing. Thus, the Secretary has delegated federal authority to regulate grade crossings to local agencies.

The locality in charge of the crossing in question has made no determination under the manual regarding the type of warning device to be installed at the crossing. Until a federal decision is reached through the local agency on the adequacy of the warning devices at the crossing, the railroad's duty under applicable state law to maintain a "good and safe" crossing . . . is not preempted.

Following *Marshall*, in *Nixon v. Burlington Northern R.R.*, No. CV 85-384-BLG-JFB, 1988 WL 215409 (D. Mont. May 2, 1988), the court found preemption because, prior to the incident in litigation, the State of Montana made an agreement with the

⁴ Courts have found the Secretary has acted upon other safety subjects. See, e.g., *Burlington Northern R.R. Co. v. State of Mont.*, 880 F.2d 1104 (9th Cir. 1989) (caboose); *Burlington Northern R.R. Co. v. State of Minn.*, 882 F.2d 1349 (8th Cir. 1989) (caboose); *Sisk v. National R.R. Passenger Corp.*, 647 F. Supp. 861 (D. Kan. 1986) (speed limit); *CSX Transp., Inc. v. Public Utils. Comm'n of Ohio*, 901 F.2d 497 (6th Cir. 1990) (hazardous materials), cert. denied, 111 S. Ct. 781 (1991); *Norfolk & Western Ry. Co. v. Public Utils. Comm'n of Ohio*, 926 F.2d 567 (6th Cir. 1991) (walkways); but see *Southern Pac. Transp. Co. v. Public Utils. Comm'n of Cal.*, 820 F.2d 1111 (9th Cir. 1987) (track clearance and walkways); *Missouri Pac. R.R. v. Railroad Comm'n of Tex.*, 850 F.2d 264 (5th Cir. 1988) (caboose), cert. denied, 488 U. S. 1009 (1989).

railroad to install flashing light signals with automatic gates at the crossing where the incident occurred. In *Smith v. Norfolk & Western Ry. Co.* 776 F. Supp. 1335 (N.D. Ind. 1991), the court applied *Marshall* and granted partial summary judgment because prior to plaintiff's accident, the local agency determined the necessary safety devices at the crossing and certified that the project was complete. In *Anderson v. Chicago Cent. & Pac. R.R. Co.*, 771 F. Supp. 227 (N.D. Ill. 1991), the court found the railroad failed to present evidence that the Illinois Commerce Commission made any determination under the MUTCD on the type of warning device to be installed at the crossing where the collision occurred.

In *Easterwood v. CSX Transp., Inc.*, 933 F.2d 1548 (11th Cir. 1991), the court held preemption did not occur where a state, because of financial constraints, failed to implement a decision to install a particular signal device. Finally, in *Southern Pac. Transp. Co. v. Maga Trucking Co.*, 758 F.-Supp. 608 (D. Nev. 1991), although citing *Marshall*, the court found no preemption where the Nevada Public Service Commission had issued a report recommending the crossing be upgraded with flashing lights and automatic gates, but, at the time of the accident, the improvements had not been made because the railroad claimed it had not received federal funds.

IV.

The dilemma presented by these varied results must be solved by resort to the language in the regulations adopted by the

Secretary. First, all traffic control devices proposed for railroad crossings must comply with the uniform federal standards expressed in the MUTCD. 23 C.F.R. § 646.214(b)(1).⁵ Second, all states must adopt the MUTCD and its revisions in order to receive federal highway funding. 23 C.F.R. § 655.603(b)(1). Third, the MUTCD standards are "intended for use both in new installations and at locations where general replacement of present apparatus is made." MUTCD, ¶ 8A-2.

Fourth, the MUTCD specifically states:

With due regard for safety and for the integrity of operations by highway and railroad users, the highway agency and the railroad company are entitled to jointly occupy the right-of-way in the conduct of their assigned duties. This requires joint responsibility in the traffic control function between the public agency and the railroad. The determination of need and selection of devices at a grade crossing is made by the public agency with jurisdictional authority. Subject to such determination and selection, the design, installation and operation shall be in accordance with the national standards contained herein.

MUTCD, Part VIII, ¶ 8A-1. This provision is particularly important for two reasons. One, it circumscribes the authority to determine what "devices" shall be erected at a grade crossing to "the public agency with jurisdictional authority." Two, it also makes the "installation and operation" of such devices subject to the determination of that agency. Thus, until a determination of need is made, no new device can be installed or operated at a crossing.

⁵ This provision relates to "grade crossing improvements" and states: "All traffic control devices proposed shall comply with the latest edition of the Manual on Uniform Traffic Control Devices for Streets and Highways supplemented to the extent applicable by State standards."

V.

The operation of §§ 8A-1 and 2 results in a consequence which concerned the district court. Assuming preemption occurred when the MUTCD was adopted or when the Secretary promulgated 23 C.F.R. § 646.200, the court reasoned that a significant delay could be encountered before a safety device would be installed. The court believed this "gap period" is inconsistent with "the recognized view that '§ 434 manifests an intent to avoid gaps in safety regulations' " *Hatfield*, 757 F. Supp. at 1205. Moreover, the court found "no regulation promulgated by the Secretary . . . which would *prohibit* a railroad from voluntarily deciding to put in place an improved warning device . . . during the gap period." *Id.* at 1206. Thus, the court reasoned, the railroad has the authority (and assumably the duty) to install and improved warning device at a dangerous crossing during the "gap period." We disagree.

The district court's conclusion overlooks the specific language of MUTCD § 8D-1 which states:

The selection of traffic control devices at a grade crossing is determined by public agencies having jurisdictional responsibility at specific locations

....

Due to the large number of significant variables which must be considered there is no single standard system of active traffic control devices universally applicable for grade crossings. Based on an engineering and traffic investigation, a determination is made whether any active traffic control system is required at a crossing and, if so, what type is appropriate. *Before a new or modified grade crossing traffic control system is installed, approval is required from the appropriate agency within a given State.*

(emphasis added). This regulation effectively prohibits a railroad from acting on its own to select and install a safety device, contrary to the district court's conclusion. Moreover, it absolves the railroad of any independent duty regarding grade crossing safety devices.⁶

VI.

The scheme of regulation is patent. Congress expressed an intent to invade the field of grade crossing safety devices, postponing that invasion only until the Secretary of Transportation adopted a rule, regulation, order, requirement, or standard relating to that field. The Secretary has responded by adopting the MUTCD and making it applicable to grade crossings. Recognizing the variability of conditions that can arise at each intersection, the Secretary has delegated to local authority the responsibility of assessing the needs and establishing the design for safety devices. Nonetheless, the statutory mandate for the adoption of a standard that would supplement any state requirement for grade crossing safety devices is satisfied by the adoption of the MUTCD. To that extent then, we disagree with *Marshall*.

Our disagreement with *Marshall* goes beyond our differing analysis of language in FRSA and MUTCD pertaining to preemption of common law standards of care for grade crossings, however.

⁶ See also Kan. Stat. Ann. § 8-1512 which states:

(a) No person shall place, maintain or display upon or in view of any highway any unauthorized sign, signal, marking or device which purports to be or is an imitation of or resembles an official . . . railroad sign or signal.

Continuing resort to common law standards after a state adopts MUTCD disrupts a basic purpose of FRSA as it is implemented by the provision of funding, namely, recognition of priorities. FRSA contemplates that some sites are more dangerous than others and that resources should first be put to use on the more dangerous ones, all in accordance with a rational scheme based on surveys. This is a prospective-looking system. Jury verdicts based on common law standards, which are of a high degree of abstraction and generality, are retrospective-looking and are addressed to only one crossing rather than a system of crossings. The hit-or-miss common law method runs counter to a statutory scheme of planned prioritization.

Having adopted the MUTCD, the Secretary prescribed the standard required by 45 U.S.C. § 434, and any state law relating to grade crossing safety devices was then superseded. All § 434 requires from preemption to occur is the adoption of the standard, and the MUTCD contains the standard. Postponing the determination of what specific device is required for a given grade crossing is simply a matter of implementing that standard. The scheme enacted by Congress did not anticipate that the effect of the standard was to be deferred or made selectively applicable for each grade crossing in the United States. To the contrary, once the Secretary adopted the standard, its superseding effect became uniform throughout the nation.

We do not believe leaving responsibility for implementation of the standard to local authority diminishes this result. Requiring a local survey of grade crossings to determine need and

design is no more than a pragmatic response to the multitude of conditions that exist throughout the country which dictate whether and what kind of a device is required at a specific place. Nonetheless, with the adoption of the MUTCD, the Secretary has absolved railroads from complying with duties imposed by state law regarding safety devices at grade crossings. Without such a duty, a railroad cannot be liable in common law negligence for failure to provide adequate safety devices at a grade crossing.

The judgment of the district court is REVERSED and REMANDED with instructions to grant defendant's motion for summary partial judgment and for further proceedings on plaintiff's remaining claims.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

DOROTHY TORRES, Administratrix, :

Plaintiff, :

vs. :

CIVIL 3:87-16 (JAC)

CONSOLIDATED RAILROAD :

CORP. ET AL, :

Defendants :

DECEMBER 4, 1991

NEW HAVEN, CONNECTICUT

BEFORE:

HON. JOSE A. CABRANES, U.S.D.J

RULING OF THE COURT

Appearances:

For the Plaintiff:

BRIAN J. FARRELL, ESQ.

16 Lost Brook Lane

Wallingford, Connecticut 06492

For the Defendants:

PATRICK J. FLAHERTY, ESQ.

RODD MANTELL, ESQ.

Cooney, Scully & Dowling

Ten Columbus Boulevard

Hartford Connecticut 06106

THE COURT: Based on the record before me and a review of that record, Defendants' Motion for Partial Summary Judgment and Motion in Limine, filed September 20, 1991, is Granted in part and Withdrawn in part.

With respect to plaintiff's claims relating to defendants' alleged failure to provide or maintain adequate warnings and traffic control devices at the Toelles Road crossing, defendants' motion for summary judgment and motion in limine are granted.

These claims are preempted by the Federal Railroad Safety Act, as implemented by the Manual on Uniform Traffic Control Devices on Streets and Highways, or MUCTD. The MUCTD vested exclusive responsibility for warnings and traffic control devices with the state Department of Transportation, and the defendant railroad companies need not answer for the state's negligence, assuming that there was negligence. See *Marshall vs. Burlington Northern, Inc.*, 720 F.2d 1149, 1154 (Ninth Circuit 1983) (Kennedy, J.).

The contrary conclusion of the court in *Karl vs. Burlington Northern Railroad Co.*, 880 F.2d 68, 76 (Eighth Circuit 1989) is flawed by that court's failure to take notice of the express preemption provided by the Federal Railroad Safety Act, 45 U.S.C. section 434, and by its apparent misreading of the Marshall decision.

In addition, I find that the decision of the Court of Appeals for the Eleventh Circuit in *Easterwood vs. CSX Transportation, Inc.* 933 F.2d 1548, 1555 (1991), which presented facts similar to those here, failed to give proper effect to the MUCTD.

With respect to plaintiff's claim that the defendant Amtrak was negligent in failing to petition the state Commissioner of Transportation, the defendants have presented un rebutted evidence that any such petition would have been pointless and moot.

Accordingly, summary judgment is Granted with respect to this issue.

With respect to the reasonableness of the train's speed, defendants' motion for summary judgment and motion in limine shall be endorsed as withdrawn by defendants' counsel at oral argument today, without prejudice to a renewal of the claim in a motion for summary judgment to be filed by no later than January 31, 1992.

If and when any such motion is filed, a response shall be due three weeks after the service and filing of the motion, but in any event by no later than February 21, 1992.

Plaintiff's counsel has requested an opportunity to serve additional requests for admission on the question of the condition of the track or the character

of the track and the train's speed. And that application is granted.

Plaintiff's counsel shall have until one week from today, December 11, 1991, to serve and file any such additional requests for admission, which requests for admission shall be answered within 30 days of service, but in any event by no later than January 13, 1992.

It is so ordered, absent further comment or objection.

And absent objection, we can go off the record to discuss further scheduling and pre-trial matters.

(Off the record discussion)

(In Recess).

* * *

IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

CSX TRANSPORTATION, INC.,
Petitioner,
v.

LIZZIE BEATRICE EASTERWOOD,
Respondent.

LIZZIE BEATRICE EASTERWOOD,
Petitioner,
v.

CSX TRANSPORTATION, INC.,
Respondent.

**On Petition for Writs of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit**

**PETITIONER'S REPLY TO THE
BRIEF OF THE UNITED STATES**

CARTER G. PHILLIPS
MARK E. HADDAD
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

JACK H. SENTERFITT *
RICHARD T. FULTON
JAMES W. HAGAN
ALSTON & BIRD
1201 W. Peachtree Street, N.W.
Atlanta, Georgia 30309-3424
(404) 881-7000
Counsel for Petitioner

June 10, 1992

* Counsel of Record

IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

Nos. 91-790 and 91-1206

CSX TRANSPORTATION, INC.,
Petitioner,

v.

LIZZIE BEATRICE EASTERWOOD,
Respondent.

LIZZIE BEATRICE EASTERWOOD,
Petitioner,

v.

CSX TRANSPORTATION, INC.,
Respondent.

**On Petition for Writs of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit**

**PETITIONER'S REPLY TO THE
BRIEF OF THE UNITED STATES**

In its brief as *amicus curiae*, the United States recommends that the Court grant the petition (No. 91-790) because the question presented there is one "of substantial importance" that "recurs . . . frequently" and has divided

the circuits. U.S. Br. 8. Petitioner obviously agrees with that conclusion.

The United States also recommends, however, that this Court should grant the cross-petition (No. 91-1206). The government acknowledges that the cross-petition "is not ripe for review in its own right" because the decision below "is the first federal appellate treatment of the issue." *Id.* at 12, 13. Nevertheless, because the cross-petition involves "the same statutory scheme" yet has regulations that "differ significantly" from those at issue in the petition, the government concludes that this Court should grant the cross-petition now in order to "provide substantially greater guidance to the lower courts." *Id.* at 12-13.

As discussed below, the very reasons that the government offers in favor of granting the petition counsel against review of the cross-petition at this time. The better course, petitioner submits, would be for the Court simply to hold the cross-petition pending its review of the petition.

As the government's brief demonstrates, the petition raises a substantial and difficult legal issue that will require careful analysis by the parties, *amici*, and this Court. "Several federal statutes . . . bear on the analysis, as do regulations promulgated by two components of the Department of Transportation." *Id.* at 2. The "four courts of appeals that have addressed" the issue "have adopted no fewer than four separate approaches" (*id.* at 8), and the analysis below also conflicts with the analysis of another circuit in an analogous preemption case. *Id.* at 9 n.5. Perhaps most telling, the United States has not yet been able to reach a view on the merits of the petition, finding it "a matter of considerable complexity and difficulty." *Id.* at 15.

Given the complexity and importance of the petition, petitioner submits that the preferable course is for the

Court to focus its review, at least for now, exclusively on the petition. The presentation of the issues relevant to the petition will necessarily be truncated if the parties and the Court must simultaneously consider the issues raised by the differing regulations applicable to the cross-petition. Moreover, effective consideration of the cross-petition may also be compromised by joint review. As the government's brief explains, resolution of the cross-petition may turn on issues largely unrelated to the petition that have not yet been considered by any appellate court, including the court below. *Id.* at 12 & n. 8 (noting that lower courts' analysis of cross-petition issue as it relates to municipal regulation of train speed as opposed to tort liability "is cast into some doubt by this Court's decision in *Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. 2476 (1991)").

Against these disadvantages, the advantage of granting immediate review seems modest at best. There is no pressing need for guidance on the excessive train-speed question because this is the first federal appellate decision on that question. And it is unclear, at least at this stage, whether resolving the question of railroad speed preemption will be helpful in preemption cases addressing state regulation of other aspects of railway activity. Questions concerning the preemptive scope of federal railway and highway safety legislation and regulations arise in many different contexts and implicate a variety of regulations. At the end of April, for example, this Court invited the United States to express its views on another petition raising railway safety preemption questions in yet another factual context—the preemption of state walkway requirements. See *Railroad Comm'n of Texas v. Missouri Pac. R.R.*, No. 91-1423, petition for cert. pending.—The very fact that that case almost certainly will be held pending the disposition of the grade crossing issue means that there will be some issues left open concerning Section 434 no matter how many cases are considered now. Accordingly holding the "unripe" petition seems particularly prudent.

The Court should not attempt now to determine the desirability of addressing all the various permutations of railway safety preemption. Instead, the Court should defer its decision on the cross-petition until after it has resolved the petition, when the Court will be in a better position to judge the need, if any, for providing additional guidance.

CONCLUSION

For these reasons and those stated in the petition and opposition to the cross-petition, the petition in No. 91-790 should be granted and the cross-petition (No. 91-1206) should either be denied or be held pending a decision in No. 91-790.

Respectfully submitted,

CARTER G. PHILLIPS
MARK E. HADDAD
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

JACK H. SENTERFITT *
RICHARD T. FULTON
JAMES W. HAGAN
ALSTON & BIRD
1201 W. Peachtree Street, N.W.
Atlanta, Georgia 30309-3424
(404) 881-7000 •

Counsel for Petitioner

* Counsel of Record

June 10, 1992

In the Supreme Court of the United States

OCTOBER TERM, 1991

CSX TRANSPORTATION, INC., PETITIONER

v.

LIZZIE BEATRICE EASTERWOOD

LIZZIE BEATRICE EASTERWOOD, PETITIONER

v.

CSX TRANSPORTATION, INC.

ON PETITIONS FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

KENNETH W. STARR

Solicitor General

STUART M. GERSON

Assistant Attorney General

MAUREEN E. MAHONEY

Deputy Solicitor General

WILLIAM K. KELLEY

Assistant to the Solicitor General

WILLIAM KANTER

JEFFREY CLAIR

Attorneys

Department of Justice

Washington, D.C. 20530

(202) 514-2217

QUESTIONS PRESENTED

1. Whether federal statutes and regulations relating to railroad-highway grade crossings preempt a state law cause of action against a railroad based on its alleged failure to design and maintain a reasonably safe grade crossing.

2. Whether federal statutes and regulations setting speed limits for trains on all classes of track nationwide preempt a state law cause of action against a railroad for operating its train at an unreasonably excessive speed.

TABLE OF CONTENTS

	Page
Statement	1
Discussion	8
Conclusion	21

TABLE OF AUTHORITIES

Cases:

<i>Anderson v. Chicago Central and Pacific Railroad Co.</i> , 771 F. Supp. 227 (N.D. Ill. 1991)	12
<i>Armijo v. Atchison, Topeka and Santa Fe Railway Co.</i> , 754 F. Supp. 1526 (D. N.M. 1990)	12
<i>Berry v. Northeastern R.R.</i> , 72 Ga. 137 (1883)	15
<i>CSX Transportation, Inc. v. Public Utilities Comm'n</i> , 901 F.2d 497 (6th Cir. 1990), cert. denied, 111 S. Ct. 781 (1991)	9
<i>CSX Transportation, Inc. v. City of Thorsby, Alabama</i> , 741 F. Supp. 889 (M.D. Ala. 1990)	13
<i>Case v. Norfolk & Western Railway Co.</i> , No. S-90-24 (Ohio Ct. App. Oct. 18, 1991)	12
<i>Consolidated Rail Corp. v. Smith</i> , 664 F. Supp. 1228 (N.D. Ind. 1987)	13
<i>Donelon v. New Orleans Terminal Co.</i> , 474 F.2d 1108 (5th Cir.), cert. denied, 414 U.S. 855 (1973)	13
<i>English v. General Electric Co.</i> , 496 U.S. 72 (1990)	14
<i>FMC Corp. v. Holliday</i> , 111 S. Ct. 403 (1990)	15
<i>Farmer v. United Brotherhood of Carpenters</i> , 430 U.S. 290 (1977)	15
<i>Fidelity Federal Savings & Loan Ass'n v. De La Cuesta</i> , 458 U.S. 141 (1982)	15
<i>Florida Lime & Avocado Growers, Inc. v. Paul</i> , 373 U.S. 132 (1963)	14
<i>Hatfield v. Burlington Northern R.R.</i> , 958 F.2d 320 (10th Cir. 1992)	11, 12
<i>Hillsborough County v. Automated Medical Laboratories, Inc.</i> , 471 U.S. 707 (1985)	15

IV

Cases—Continued:

	Page
<i>Hines v. Davidowitz</i> , 312 U.S. 52 (1941)	14
<i>Jones v. Rath Packing Co.</i> , 430 U.S. 519 (1977)	15
<i>Karl v. Burlington Northern Railroad Co.</i> , 880 F.2d 68 (8th Cir. 1989)	9, 12
<i>Macon & Western R.R. Co. v. Davis</i> , 18 Ga. 679 (1855)	15
<i>Marshall v. Burlington Northern, Inc.</i> , 720 F.2d 1149 (9th Cir. 1983)	10, 11
<i>Missouri Pacific R. Co. v. Railroad Comm'n of Texas</i> , 833 F.2d 570 (5th Cir. 1987)	16
<i>Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n</i> , 461 U.S. 190 (1983)	14
<i>Rice v. Santa Fe Elevator Corp.</i> , 331 U.S. 218 (1947)	14, 15
<i>Runkle v. Burlington Northern</i> , 613 P.2d 982 (Mont. 1980)	12
<i>Schneidewind v. ANR Pipeline Co.</i> , 485 U.S. 293 (1988)	14
<i>Shaw v. Delta Air Lines, Inc.</i> , 463 U.S. 85 (1983)	14
<i>Sisk v. National Railroad Passenger Corp.</i> , 647 F. Supp. 861 (D. Kan. 1986)	13
<i>Southern Pacific Transportation Co. v. Maga Trucking Co.</i> , 758 F. Supp. 608 (D. Nev. 1991) ..	12
<i>Southern R.R. v. Georgia Kraft Co.</i> , 373 S.E.2d 774 (Ga. Ct. App. 1988)	12
<i>Wisconsin Public Intervenor v. Mortier</i> , 111 S. Ct. 2476 (1991)	13

Constitution, statutes and regulations:

U.S. Const.:

Art. VI, Cl. 2 (Supremacy Clause)	14
Federal Railroad Safety Act of 1970, 45 U.S.C. 421 <i>et seq.</i>	2
45 U.S.C. 421	2
45 U.S.C. 431	2
45 U.S.C. 431 (q)	3
45 U.S.C. 433 (b)	2, 17
45 U.S.C. 434	4, 5, 8, 9, 10, 11, 13, 16, 17, 19
45 U.S.C. 435 (a)	4

V

Statutes and regulations—Continued:

	Page
45 U.S.C. 436 (a)	4
45 U.S.C. 436 (a) (2)	4
45 U.S.C. 436 (b)	4
45 U.S.C. 436 (b) (2)	4
45 U.S.C. 436 (e)	4
45 U.S.C. 437	3
45 U.S.C. 438-439	3
45 U.S.C. 438 (b)	4
Hazardous Materials Transportation Act, 49 U.S.C. App. 1801 <i>et seq.</i>	9
Rail Safety Improvement Act of 1988, Pub. L. No. 100-342, § 23, 102 Stat. 639	3
23 U.S.C. 109 (d)	6, 17, 18
23 U.S.C. 130	8, 18, 19
23 U.S.C. 130 (a)	5
23 U.S.C. 130 (b)	5
23 U.S.C. 130 (c)	5
23 U.S.C. 130 (d)	6, 18
23 U.S.C. 130 (e)	5
23 U.S.C. 402 (a)	6, 17
23 U.S.C. 402 (b)	4, 6
23 U.S.C. 402 (c)	6
Ga. Code Ann. § 32-6-120 (Michie 1991)	15
23 C.F.R.:	
Pt. 630	18, 19
Pt. 646:	
Section 646.210 (b) (1)	5
Pt. 655:	
Section 646.214 (b)	6
Section 646.214 (b) (3) (i)	19
Section 655.601 (b)	17
Section 655.603	6
Section 655.603 (a)	17
Pt. 924	6, 10, 18, 19
Section 924.9	6
Pt. 1204	6
Section 1204.4, Highway Safety Program Guideline No. 12 (G)	6

Statutes and regulations—Continued:

	Page
49 C.F.R.:	
Pt. 1:	
Section 1.48 (o)	3
Section 1.49 (m)	3
Pt. 212	4
Pt. 213	3, 20
Section 213.109	20
Section 213.53	20
Section 213.55	20
Section 213.57	20
Section 213.59	20
Section 213.63	20
Pt. 217	3
Pt. 218	3
Pt. 219	3
Miscellaneous:	
56 Fed. Reg. 33,722 (1991)	3
Federal Railroad Administration, <i>Rail-Highway</i> <i>Crossing Accident/Incident and Inventory Bulletin</i> (July 1991)	12
H.R. Rep. No. 1194, 91st Cong., 2d Sess. (1970)	4

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-790

CSX TRANSPORTATION, INC., PETITIONER

v.

LIZZIE BEATRICE EASTERWOOD

No. 91-1206

LIZZIE BEATRICE EASTERWOOD, PETITIONER

v.

CSX TRANSPORTATION, INC.

ON PETITIONS FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

On February 24, 1988, Thomas Easterwood, the husband of cross-petitioner Lizzie Beatrice Easterwood, was killed when the truck he was driving was struck by a locomotive operated by CSX Transportation, Inc. Invoking federal diversity jurisdic-

tion, Mrs. Easterwood filed a wrongful death action against petitioner CSX Transportation, Inc. in the United States District Court for the Northern District of Georgia. Mrs. Easterwood alleged that CSX was liable because (1) the grade crossing was negligently designed and maintained, and (2) the train that struck her husband's truck was travelling at an excessive speed. The question presented by these two cases is the extent to which those state law tort claims are preempted by federal law. Several federal statutes relating to rail and highway safety bear on the analysis, as do regulations promulgated by two components of the Department of Transportation, the Federal Railroad Administration (FRA) and the Federal Highway Administration (FHWA).

1. a. Congress enacted the Federal Railroad Safety Act of 1970 (FRSA), 45 U.S.C. 421 *et seq.*, to "promote safety in all areas of railroad operations and to reduce railroad-related accidents, and to reduce deaths and injuries to persons and to reduce damage to property caused by accidents involving any carrier of hazardous materials." 45 U.S.C. 421. In order to achieve these goals, FRSA vests the Secretary of Transportation with broad authority to prescribe rules, regulations, orders, and standards in all areas of rail safety. 45 U.S.C. 431.

Two provisions of FRSA specifically address the regulation of railroad-highway grade crossings. First, the statute directs the Secretary to "undertake a coordinated effort toward the objective of developing and implementing solutions to the grade crossing problem." 45 U.S.C. 433(b). Second, in an amendment added after the accident at issue here, Congress directed the Secretary to issue, by June 22, 1989, "such rules, regulations, orders, and standards

as may be necessary to ensure the safe maintenance, inspection, and testing of signal systems and devices at railroad highway grade crossings." 45 U.S.C. 431(q), added by the Rail Safety Improvement Act of 1988, Pub. L. No. 100-342, § 23, 102 Stat. 639.

The Secretary has delegated to the Administrator of FRA general authority to promulgate rail safety rules and regulations under FRSA. 49 C.F.R. 1.49(m). In addition, insofar as Section 431(q)'s rulemaking authority implicates other federal laws pertaining to highway safety, the Secretary has also delegated his rulemaking authority to the Administrator of the FHWA. See 49 C.F.R. 1.48(o), 1.49(m). FRA has promulgated standards for track safety, operating rules and practices, the control of alcohol and drug use, and other matters affecting rail safety. See, *e.g.*, 49 C.F.R. Pts. 213, 217, 218, and 219. FRA has also promulgated regulations (effective October 1, 1991) that require railroads to file reports on the performance, maintenance, testing, and inspection of grade crossing signal systems. 56 Fed. Reg. 33,722 (1991).

The Secretary may enforce regulations promulgated under FRSA through issuance of compliance orders and assessment of civil penalties. 45 U.S.C. 437, 438. Those orders are subject to enforcement in actions (in which injunctive relief is available) brought by the Attorney General in federal district court. See 45 U.S.C. 438-439.¹ The Act does not

¹ The statute specifies that monetary penalties, to be paid into the United States Treasury, may be imposed for each violation of a regulation, in an amount from \$250 to \$10,000 per violation; in cases "where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury to persons, or has caused death or

provide a private right of action to enforce its provisions.

FRSA addresses the role of the States in the regulatory scheme in two respects. First, the statute provides that the States may participate in inspection and surveillance activities if they establish a state program and comply with certain reporting requirements. 45 U.S.C. 435(a).² In cases where the Secretary has declined to bring enforcement proceedings arising out of a violation, a participating State is authorized to bring an enforcement action in federal district court seeking monetary or injunctive relief. 45 U.S.C. 436(a), (b). If the Secretary determines that no violation occurred, however, the State is not permitted to bring such an action. 45 U.S.C. 436(a)(2), (b)(2). By explicitly defining the role of the States in bringing enforcement proceedings, Congress made clear its understanding that States would not be permitted independently to participate in regulatory enforcement of federal railroad safety rules. See H.R. Rep. No. 1194, 91st Cong., 2d Sess. 11, 18-19 (1970).³

Second, FRSA contains an express preemption provision. Section 434 provides:

injury," a penalty of up to \$20,000 may be imposed. 45 U.S.C. 438(b). In addition, the statute authorizes criminal penalties for certain violations of reporting and record keeping requirements. 45 U.S.C. 436(e).

² The Secretary has promulgated regulations implementing the statutory authorization for States to participate in enforcement of the federal regime. See 49 C.F.R. Pt. 212.

³ In addition, in 23 U.S.C. 402(b), Congress mandated, as a condition on federal funding, that state agencies implementing safety programs (including the Rail-Highway Crossings Program) be empowered to enforce such programs to the satisfaction of the Secretary of Transportation.

The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

45 U.S.C. 434.

b. The hazards posed by grade crossings implicate highway as well as rail safety. Thus, in addition to FRSA, federal highway legislation addresses the safety of railroad-highway grade crossings. First, Congress has made available to the States federal funds "for the elimination of the hazards of railway-highway crossings." 23 U.S.C. 130(a). At least half of those funds must be used to install signals and other protective devices. 23 U.S.C. 130(e). In addition, railroads are liable to the United States for the value of any benefit received as a result of a federally funded grade crossing improvement project involving track they own. 23 U.S.C. 130(b), (c). The Secretary has determined, however, that such projects are "of no ascertainable net benefit to the railroads and there shall be no required railroad share of the costs." 23 C.F.R. 646.210(b)(1).

Second, Congress has required the States to develop a program to identify dangerous railroad grade crossings and to make them safe. As part of the Rail-Highway Crossings Program, the States must "maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose." 23 U.S.C. 130(d); see also 23 C.F.R. 924.9; 23 C.F.R. 1204.4, Highway Safety Program Guideline No. 12(G). The responsibility to survey and improve the safety of grade crossings is part of the States' broader responsibility to have in place a highway safety program as a condition on receipt of federal funding of highway safety improvement projects. See 23 U.S.C. 402(c). To obtain the Secretary's approval of its Section 402 program, a State must provide assurances that its program will be administered through a state agency with "adequate powers * * * to carry out [the program] to the satisfaction of the Secretary." 23 U.S.C. 402(b); see also 23 C.F.R. Pts. 924, 1204.

Finally, Congress has directed the Secretary to promulgate uniform federal standards governing highway and rail safety. 23 U.S.C. 402(a); see also 23 U.S.C. 109(d). The Secretary has accordingly promulgated uniform standards governing, among other matters, the form and placement of traffic control devices installed at railroad-highway grade crossings. Those standards are set forth in the Manual on Uniform Traffic Control Devices (Manual or MUTCD). Any protective device installed at a federally funded grade crossing project must comply with the Manual's requirements for design, placement, operation, maintenance, and uniformity. 23 C.F.R. 646.214(b), 655.603. The Manual does not, however,

specify when particular safety devices are required. This is based on the recognition that those decisions are engineering judgments to be made by responsible local authorities on a case-by-case basis. See MUTCD 1A-4.

2. Following her spouse's death, Mrs. Easterwood sued the railroad for tort damages in her capacity as executrix of Mr. Easterwood's estate. She alleged that CSX was negligent under Georgia law because it (1) failed to install gate arms at the grade crossing and failed to remove a dangerous hump in the grade crossing surface; and (2) operated the train at an unsafe speed.⁴ CSX Pet. App. 24a, 27a.

The district court granted summary judgment for the railroad. CSX Pet. App. 28a. The court held that allegations concerning the adequacy of the crossing signals and safety of the train's operating speed were preempted by federal law. *Id.* at 26a-27a. The court also held that, in light of Mrs. Easterwood's inability to produce supporting evidence or establish a dispute as to issues of material fact, CSX was entitled to judgment on the claims alleging negligence in maintaining the condition of the crossing. *Id.* at 27a.

3. The court of appeals affirmed in part and reversed in part. The court agreed that Easterwood's negligence claim based on excessive train speed was preempted by FRA regulations. The court of appeals

⁴ Mrs. Easterwood also claimed that the railroad negligently allowed vegetation, which obscured motorists' view of oncoming trains, to grow adjacent to the tracks. The court of appeals held that claim to be partially preempted. See CSX Pet. App. 10a. Neither party has challenged in this Court the court of appeals' treatment of that issue.

held, however, that federal law did not preempt a railroad's state-law duty to construct and maintain safe grade crossings. CSX Pet. App. 10a-12a. The court reasoned that FRSA's express preemption provision, 45 U.S.C. 434, was not implicated because the Secretary had not promulgated any regulations relating to grade crossing safety pursuant to that statute. See CSX Pet. App. 10a-11a. Federal highway legislation does address grade crossing safety, see 23 U.S.C. 130, but that legislation does not expressly preempt state law and "is not such a pervasive set of regulations that we could fairly imply a congressional intent to pre-empt the field." CSX Pet. App. 11a.

DISCUSSION

1. The courts of appeals have adopted widely disparate positions on the question whether state tort claims based on unsafe grade crossings are preempted (the question presented in No. 91-790). We believe that the issue is of substantial importance and recurs so frequently that review by this Court is warranted. Since the petition and cross-petition for certiorari were filed in these cases, the Tenth Circuit has also addressed the issue in a holding that conflicts with the decision in this case, and there is now little doubt that the issue is ripe for this Court's review. There is less need to review the issue in No. 91-1206—whether state law tort claims based on excessive train speed are preempted—because the decision below is the first federal appellate decision on that question. We nonetheless are persuaded, for the reasons explained below, that the cross-petition should be granted as well.

a. The four courts of appeals that have addressed whether federal law preempts state tort law claims

based on negligent design of railway grade crossings have adopted no fewer than four separate approaches. In addition to the Eleventh Circuit in this case, the Eighth Circuit has concluded that federal law does not preempt state tort claims based upon the alleged inadequacy of warning devices at grade crossings. *Karl v. Burlington Northern Railroad Co.*, 880 F.2d 68, 75-76 (8th Cir. 1989). The *Karl* court did not, however, even discuss the issue of express preemption under 45 U.S.C. 434. See 880 F.2d at 75-76. The Eleventh Circuit below, in contrast, held that express preemption under 45 U.S.C. 434 is not implicated by regulations promulgated pursuant to federal highway legislation.⁵

⁵ In our view, the Eleventh Circuit was clearly wrong to view Section 434 as being triggered only by regulations adopted pursuant to FRSA. The plain language of the statute refers to *any* regulation adopted by the Secretary of Transportation, regardless of the source of statutory authorization. Thus, regulations adopted by the Secretary pursuant to federal highway legislation trigger FRSA's express preemption if a State regulation "relate[s] to railroad safety" and the Secretary's regulations "cover[] the subject matter" of the state law requirement at issue. 45 U.S.C. 434. We took that position in our brief *amicus curiae* urging the Court to deny certiorari in *Public Utilities Comm'n of Ohio v. CSX Transp., Inc.*, cert. denied, 111 S. Ct. 781 (1991) (*PUCO*). In *PUCO*, we agreed with the Sixth Circuit that regulations promulgated by the Secretary under the Hazardous Materials Transportation Act, 49 U.S.C. App. 1801 *et seq.*, which regulate the transport of hazardous materials by train, expressly preempted similar state regulations by virtue of 45 U.S.C. 434. See *CSX Transportation, Inc. v. Public Utilities Comm'n of Ohio*, 901 F.2d 497 (6th Cir. 1990), cert. denied, 111 S. Ct. 781 (1991). The Eleventh Circuit's analysis in this case conflicts with the Sixth Circuit's decision in *PUCO*.

The Ninth Circuit has adopted a third approach. *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149, 1154 (9th Cir. 1983) (per Kennedy, J.), held that the MUTCD, as well as federal regulations requiring States to survey the safety of grade crossings and implement appropriate improvement projects as a condition on receipt of federal funds, see 23 C.F.R. Pt. 924, constituted a delegation of the Secretary's authority to regulate railroad safety at grade crossings under FRSA. Thus, a decision by a state or local agency that particular safety devices are necessary (or unnecessary) to make a grade crossing safe constitutes a regulation of the Secretary covering the subject matter of grade crossing safety at that crossing. The court held, however, that "[u]ntil a federal decision is reached through the local agency on the adequacy of the warning devices at [a particular] crossing, the railroad's duty under applicable state law to maintain a 'good and safe' crossing * * * is not preempted." 720 F.2d at 1154. Once a local assessment of the safety needs at a crossing is made, however, express preemption under 45 U.S.C. 434 is triggered; thereafter, state tort claims relating to unsafe grade crossing conditions are preempted altogether. The Ninth Circuit's contingent preemption approach is thus inconsistent with that of the court of appeals in this case and the Eighth Circuit in *Karl*.⁶

⁶ The court of appeals in this case thought *Marshall* was "distinguishable" because the failure to act by the local authorities with respect to the grade crossing at issue was not because of an affirmative decision that the crossing was safe. CSX Pet. App. 12a. Thus, the court of appeals said, "we have no occasion to decide whether a federally sponsored upgrade would insulate the railroad from liability." *Ibid.* The court of appeals failed to recognize, however, that the *Marshall*

Moreover, there can be no doubt that a different result would have been reached on these facts in the Tenth Circuit. In the recent case of *Hatfield v. Burlington Northern R.R.*, 958 F.2d 320 (10th Cir. 1992), the Tenth Circuit held that state-law grade crossing claims have been preempted. The court agreed with *Marshall*'s holding that the federal regulations pertaining to grade crossing safety "cover[] the subject matter" of grade crossing safety within the meaning of 45 U.S.C. 434, and thus preempt any common law duty of care to provide adequate safety devices. In contrast to the Ninth Circuit's contingent preemption approach, however, the *Hatfield* court held that the mere adoption of the federal scheme, as opposed to the local determination as to what safety steps are required to make particular grade crossings safe, preempted the entire field. Thus, no state-law claim relating to the safety of any grade crossing is permissible, because adop-

court found no preemption because the local authorities had not made a decision as to what safety devices were appropriate at the crossing at issue there. See 720 F.2d at 1154. In this case, the district court concluded that the safety of the crossing had been analyzed, and local authorities determined that a crossing gate was needed; that decision was not implemented, however, because the funds earmarked for the project were directed to other higher priority uses. See CSX Pet. App. 26a. Thus, under the Ninth Circuit's analysis, the case for preemption here was *stronger* than in *Marshall* itself. The court of appeals, however, completely glossed over the complexities added to the preemption analysis by an unexecuted local decision that safety devices are appropriate. In any event, despite the fact that the Eleventh Circuit expressed only "reservations," *id.* at 12a n.5, about *Marshall*, it is clear that the Eleventh and Ninth Circuit's analytical approaches are diametrically at odds, and lead to divergent results.

tion of the MUTCD "absolved railroads from complying with duties imposed by state law." 958 F.2d at 324.⁷

Not only are the courts of appeals in conflict, the issue is of considerable importance. Railway grade crossing accidents are regrettably common, and thus continue to pose a serious threat to life and property. The Department of Transportation reports that in calendar year 1990 there were 5,022 motor vehicle accidents at railroad-highway crossings, resulting in 568 deaths and 2,186 injuries. Federal Railroad Administration, *Rail-Highway Crossing Accident/Incident and Inventory Bulletin*, No. 13, at 2 (July 1991). This volume of accidents suggests that the underlying legal issues warrant review by this Court.

⁷ Decisions of other federal and state courts reflect a similar divergence of opinion. Some have followed the Eighth Circuit's approach in *Karl v. Burlington Northern Railroad*, *supra*, and held that federal regulation does not preempt a railroad's general duty to exercise reasonable care at a grade crossing. See, e.g., *Southern Pacific Transportation Co. v. Maga Trucking Co.*, 758 F. Supp. 608 (D. Nev. 1991); *Runkle v. Burlington Northern*, 613 P.2d 982 (Mont. 1980); *Southern Railroad Co. v. Georgia Kraft Co.*, 373 S.E.2d 774 (Ga. Ct. App. 1988). Some decisions have followed the Ninth Circuit's approach in *Marshall*, holding that the duty to exercise reasonable care at a crossing is preempted only if the state or local government has made a determination with respect to the adequacy of that crossing pursuant to the federal program. See *Case v. Norfolk & Western Railway Co.*, No. S-90-24 (Ohio Ct. App. Oct. 18, 1991); *Anderson v. Chicago Central and Pacific Railroad Co.*, 771 F. Supp. 227 (N.D. Ill. 1991). And some decisions have followed the Tenth Circuit's approach in *Hatfield*, holding that the MUTCD preempts all state law tort remedies, without regard to whether the state or local agency has determined whether the warning devices at the crossing are adequate. *Armijo v. Atchison, Topeka, and Santa Fe Railway Co.*, 754 F. Supp. 1526 (D. N.M. 1990).

b. The issue raised by cross-petitioner Easterwood—whether federal regulations pertaining to train speed preempt common law claims based on unsafe train operation—is not ripe for review in its own right. A number of federal courts have considered whether municipal ordinances regulating train speed are preempted by federal law, and have generally held that only States, not local governments, retain authority under 45 U.S.C. 434 to adopt supplemental rail safety regulation pertaining to "local safety hazards." See, e.g., *Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108 (5th Cir.), cert. denied, 414 U.S. 855 (1973); *CSX Transportation, Inc. v. City of Thorsby, Alabama*, 741 F. Supp. 889 (M.D. Ala. 1990); *Consolidated Rail Corp. v. Smith*, 664 F. Supp. 1228 (N.D. Ind. 1987); *Sisk v. National Railroad Passenger Corp.*, 647 F. Supp. 861 (D. Kan. 1986).⁸ As noted, however, the Eleventh Circuit's decision in this case is the first federal appellate treatment of the issue whether state common law duties are similarly preempted by federal train speed regulations.

Although the issue presented in No. 91-1206 would therefore ordinarily not warrant review, we believe that the Court should grant the cross-petition in tandem with the clearly meritorious petition in No. 91-790. The cross-petition raises doctrinal issues similar to those in the petition, and involves application of the

⁸ The analysis of these cases is cast into some doubt by this Court's decision in *Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. 2476 (1991). In that case, the Court held that an affirmative grant of regulatory authority to States could not generally be read impliedly to exclude similar authority in local political subdivisions, because the subdivisions are "components of the very entity the statute empowers." 111 S. Ct. at 2483.

same statutory scheme. The relevant regulations, however, differ significantly in their approach to the safety issues they address. Application of the Court's preemption analysis to both sets of regulations would accordingly provide substantially greater guidance to the lower courts.

2. The principles governing preemption analysis are well established. State law is preempted under the Supremacy Clause, U.S. Const. Art. VI, Cl. 2, when Congress expressly so provides. See, e.g., *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983). In the absence of such express preemption, preemption will nonetheless be implied when it is clear that Congress intended federal regulation of a field to be exclusive. See, e.g., *English v. General Electric Co.*, 496 U.S. 72 (1990); *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983). Such an intent may be inferred from a "scheme of federal regulation * * * so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where an Act of Congress "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299-300 (1988) (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Finally, state law is preempted to the extent that it actually conflicts with federal law. Such a conflict is present where it is impossible to comply with both federal and state requirements (see *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963)), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

In every case, whether state law is preempted turns on congressional intent. If a lawfully promulgated agency regulation is at issue, that regulation's preemptive scope is similarly determined by the intent of the issuing authority. *FMC Corp. v. Holliday*, 111 S. Ct. 403, 407 (1990); *Fidelity Federal Savings & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 154 (1982). The Court has made clear, however, that preemption is not to be found in fields traditionally regulated by the States under the historic police power "unless that was the clear and manifest purpose of Congress." *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715 (1985) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) and *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230). State tort law is undoubtedly within the States' historic police power, see, e.g., *Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290, 304 (1977), and Georgia has traditionally imposed upon railroads a common law duty to exercise reasonable care at grade crossings. See, e.g., *Macon & Western R.R. Co. v. Davis*, 18 Ga. 679 (1855); *Berry v. Northeastern R.R.*, 72 Ga. 137 (1883).⁹ Thus, Mrs. Easterwood's claims are presumed not to be preempted, and CSX bears the burden in seeking to demonstrate the contrary.

3. Application of this general framework to the issues presented by the petitions here is a matter of considerable complexity and difficulty. Since the Court issued its order of March 23, 1992, inviting the views of the United States, we have been in the process of

⁹ Georgia has codified this common law duty, and now requires railroads "to maintain * * * grade crossings in such condition as to permit the safe and convenient passage of public traffic." Ga. Code Ann. § 32-6-120 (Michie 1991).

comprehensively reviewing the legal questions presented. That review is being conducted in conjunction with the agencies charged with administering and enforcing the federal railroad safety statutes and regulations. We have been unable to complete our review of the merits during the intervening period. However, in view of our conclusion that the petition in No. 91-790 clearly warrants review, and that, on balance, the cross-petition in No. 91-1206 does as well, we believe that the better course is to so advise the Court now, so the decision whether to grant review can be made during the Court's current term.

As described above, Section 434 of FRSA is an express preemption provision that defines the scope of state authority to regulate railroad safety. State law "relating to railroad safety" may continue in force "until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement." 45 U.S.C. 434.¹⁰ In light of Section 434's language, the key question in determining whether a particular state law may continue in force is whether the Secretary has promulgated a regulation "covering the subject matter of such State requirement." See *Missouri Pacific R. Co. v. Railroad Comm'n of Texas*, 833 F.2d 570, 574-575 & n.5 (5th Cir. 1987) (state regulation is preempted only if it would impair or supplement a federal scheme that "superintends" a particular safety hazard).

a. The issue presented in CSX's petition for certiorari, No. 91-790, is whether a cause of action based

¹⁰ That rule is limited by the qualification that compatible state regulation of a matter covered by federal regulation is nonetheless permissible if necessary "to eliminate or reduce what is essentially a local hazard," and if it does not unduly burden interstate commerce. 45 U.S.C. 434.

on breach of a state law duty to provide a safe grade crossing has been preempted. CSX claims that two sets of regulations promulgated by the Department of Transportation "cover" the subject matter of a state law duty of care to provide a safe grade crossing, and hence preempt that duty under Section 434. First, the MUTCD establishes standards for such matters as the selection, design, location, illumination, and construction of the signs and other safety devices placed at a grade crossing.¹¹ The MUTCD was developed by the FHWA in response to congressional directives to develop uniform standards for federally assisted state highway safety programs, see 23 U.S.C. 402(a), to develop standards for traffic signals and other warning devices installed on federally assisted highway projects, see 23 U.S.C. 109(d), and to "develop[] and implement[] solutions to the grade crossing problem." 45 U.S.C. 433(b). It constitutes "the national standard for all traffic control devices installed on any street, highway, or bicycle trail open to public travel in accordance with 23 U.S.C. 109(d) and 402(a)." 23 C.F.R. 655.603(a).

With respect to grade crossings in particular, the MUTCD provides that the duty to maintain grade crossings is a "joint responsibility" of the railroads and the States. MUTCD 8A-1.¹² The MUTCD does

¹¹ Exercising authority delegated from the Secretary, FHWA has incorporated the MUTCD into federal law, see 23 C.F.R. 655.601(b).

¹² The Manual states:

[T]he highway agency and the railroad company are entitled to jointly occupy the right-of-way in the conduct of their assigned duties. This requires joint responsibility in the traffic control function between the public agency

not prescribe substantive standards for determining whether particular safety devices are appropriate at a grade crossing, stating that the "determination of need and selection of devices at grade crossings is made by the public agency with jurisdictional authority." *Ibid.*¹³ Moreover, the MUTCD prohibits railroads from implementing any improvements to grade crossings without first obtaining the responsible public agency's approval. *Id.* at 8D-1 ("Before a new or modified grade crossing traffic control system is installed, approval is required from the appropriate agency within a given State.").

In addition to the MUTCD, the body of federal regulations implementing the Rail-Highway Crossings Program, 23 U.S.C. 130(d), bears on the analysis. See 23 C.F.R. Pts. 630, 924. Under the Rail-Highway Crossings Program, 23 U.S.C. 130, the federal government provides funds to state and local governments to reduce or eliminate hazards at grade crossings. In particular, 23 U.S.C. 130(d) requires States to identify hazardous crossings and to establish a schedule

and the railroad. The determination of need and selection of devices at grade crossings is made by the public agency with jurisdictional authority. Subject to such determination and selection, design, installation and operation shall be in accordance with the national standards contained herein.

MUTCD 8A-1.

¹³ See also MUTCD 1A-4 ("while this Manual provides standards for design and application of traffic control devices, the Manual is not a substitute for engineering judgment"); *id.* at 8D1-1 ("Due to the large number of significant variables which must be considered there is no single standard system of active traffic control devices universally applicable for grade crossings.").

for implementing crossing improvements. Consistent with the scope of the statute, the Secretary's regulations establish procedural requirements that States must meet in implementing their programs. See 23 C.F.R. Pts. 630, 924. Like the MUTCD, the statute and regulations do not generally establish substantive standards for what constitutes a safe grade crossing. Cf. 23 C.F.R. 646.214(b)(3)(i).

Resolution of the question in No. 91-790 requires analysis of the body of federal regulations pertaining to grade crossings and its effect on a state law duty of care to provide safe grade crossings.¹⁴ If the federal scheme "cover[s] the subject matter" of that state-law "requirement," Section 434 requires state law to give way. Moreover, a predicate to that analysis is the determination of what state law "requirement" is at issue—a question that neither the lower courts nor the parties have focused on. Finally, apart from express preemption under Section 434, the Court must also consider whether a state law tort remedy for a person injured as a result of a railroad's failure to provide a safe grade crossing conflicts with, or stands as an obstacle to, the federal regulatory regime. Unlike Section 434 preemption (which can only be triggered by the Secretary's regulations), that "conflict" preemption analysis must take account of both the Secretary's regulations and FRSA and other highway legislation relating to grade crossings.

b. The issue presented in the cross-petition, No. 91-1206, is whether a state law cause of action based on a railroad's violation of a duty to travel at a speed that

¹⁴ In addition to the possible preemptive effect of the regulations implementing the Rail-Highway Crossings Program pursuant to Section 434's express preemption, the independent preemptive force of 23 U.S.C. 130 must also be considered.

is reasonable under the circumstances has been preempted. The Secretary—through the FRA—has promulgated regulations setting maximum train speeds on all track throughout the country. See 49 C.F.R. Pt. 213. Maximum permissible train speeds are determined based on a variety of factors, including the type of surface, structure, geometry, curvature, and elevation of the track. 49 C.F.R. 213.57, 213.59.¹⁵ Like the analysis in No. 91-790, resolution of the question in No. 91-1206 requires analysis of the Secretary's train speed regulations in relation to the state-law requirement at issue.

4. Our review of the legal questions presented in these cases is ongoing. If the Court grants one or both petitions, we anticipate filing at the appropriate time a brief advising the Court of the views of the United States on the merits.

¹⁵ The regulations establish six classes of track, and set a maximum speed for each class. For example, class 6 track, which carries the highest train speed limit, must meet tolerances for track gage (49 C.F.R. 213.53), track alignment (49 C.F.R. 213.55), track surface (49 C.F.R. 213.63), and the number of cross-ties in a defined length of track (49 C.F.R. 213.109).

CONCLUSION

The petitions for writs of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

MAUREEN E. MAHONEY
Deputy Solicitor General

WILLIAM K. KELLEY
Assistant to the Solicitor General

WILLIAM KANTER
JEFFREY CLAIR
Attorneys

JUNE 1992

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No. 91-790

IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

CSX TRANSPORTATION, INC.,
v. *Petitioner,*

LIZZIE BEATRICE EASTERWOOD,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

**MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*
AND BRIEF *AMICUS CURIAE* OF THE
ASSOCIATION OF AMERICAN RAILROADS
IN SUPPORT OF PETITIONER**

JOHN H. BROADLEY
DAVID W. OGDEN *
KIT PIERSON
JULIE M. CARPENTER
JENNER & BLOCK
601 Thirteenth Street, N.W.
Twelfth Floor
Washington, D.C. 20005
(202) 639-6000

ROBERT W. BLANCHETTE
Vice President-Law and
General Counsel
ASSOCIATION OF AMERICAN
RAILROADS
American Railroads Building
50 F Street, N.W.
Washington, D.C. 20001
(202) 639-2505
Counsel for Amicus

December 18, 1991

* Counsel of Record

IN THE
Supreme Court of the United States

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**On Petition for Writ of Certiorari to the
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for the Eleventh Circuit**

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Association of American Railroads ("AAR") respectfully requests leave to file the attached brief *amicus curiae* in support of the Petition for Certiorari in this case. Petitioner has consented to the filing of the brief. Counsel for Respondent has not consented.

AAR is a non-profit trade association representing the Nation's major railroads. Its members account for approximately 85 percent of the line haulage, employ 90 percent of the workers, and produce approximately 93 percent of the freight revenues of all railroads in the United States. AAR represents its member railroads and appears in an *amicus* capacity before courts, agencies, and the Congress in matters of common interest.

The railroad industry operates a national railroad network. Because their operations are so pervasive and in-

terdependent, AAR members are vitally affected by decisions on federal preemption respecting railroad safety regulations. To a large degree, a balkanized pattern of safety regulation throughout the various states could cripple the industry's viability. As Congress has explicitly recognized, federal preemption is often the only rational method of assuring an efficient and safe national rail system. This is especially true regarding grade crossings which exist everywhere trains operate. Indeed, in calendar year 1989, the Federal Railroad Administration reported that there were 178,627 public grade crossings nationwide. U.S. Dept. of Transportation, Federal Railroad Administration, "Rail-Highway Crossing Accident/ Incident and Inventory Bulletin," No. 12, Calendar Year 1989 at p. 45 (June 1990).

AAR files this brief to emphasize the significance of this issue to the railroad industry, and to support Petitioner's position that federal regulations governing rail crossing safety preempt state regulation of the same subject matter.

For the foregoing reasons, the Association of American Railroads respectfully requests that leave to file the attached brief *amicus curiae* in support of the petition for certiorari be granted.

Respectfully submitted,

JOHN H. BROADLEY
DAVID W. OGDEN *
KIT PIERSON
JULIE M. CARPENTER
JENNER & BLOCK
601 Thirteenth Street, N.W.
Twelfth Floor
Washington, D.C. 20005
(202) 639-6000

December 18, 1991

ROBERT W. BLANCHETTE
Vice President-Law and
General Counsel
ASSOCIATION OF AMERICAN
RAILROADS
American Railroads Building
50 F Street, N.W.
Washington, D.C. 20001
(202) 639-2505
Counsel for Amicus
* Counsel of Record

QUESTION PRESENTED

Whether the United States Court of Appeals for the Eleventh Circuit, in conflict with the United States Courts of Appeals for the Sixth and Ninth Circuits, erroneously concluded that a regulation promulgated by the Secretary of Transportation did not preempt state tort law relating to railroad safety, merely because the federal regulation was not promulgated pursuant to the Federal Railroad Safety Act.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
INTEREST OF AMICUS CURIAE	1
INTRODUCTION AND SUMMARY OF ARGUMENT	1
REASONS FOR GRANTING THE WRIT	4
I. THE DECISION OF THE ELEVENTH CIRCUIT IS IN CONFLICT WITH DECISIONS OF THE SIXTH AND NINTH CIRCUITS	4
II. THE QUESTION OF FEDERAL PREEMPTION OF RAILROAD SAFETY REGULATIONS IS AN IMPORTANT ONE	12
CONCLUSION	16

TABLE OF AUTHORITIES

CASES:	Page
<i>Anderson v. Chicago Cent. And Pacific R. Co.</i> , 771 F. Supp. 227 (N.D. Ill. 1991)	13
<i>Armijo v. Atchison, Topeka & Santa Fe Ry. Co.</i> , 754 F. Supp. 1526 (D.N.M. 1990)	7, 13, 15
<i>Burlington Northern R. Co. v. State of Montana</i> , 880 F.2d 1104 (9th Cir. 1989)	14
<i>CSX Transp., Inc. v. City of Tullahoma, Tenn.</i> , 705 F. Supp. 385 (E.D. Tenn. 1988)	14
<i>CSX Transp., Inc. v. Public Utilities Comm'n of Ohio</i> , 901 F.2d 497 (6th Cir. 1990), <i>cert. denied</i> , 111 S.Ct. 781 (1991)	7, 8, 14
<i>Easterwood v. CSX Transp., Inc.</i> , 742 F. Supp. 676 (N.D. Ga. 1990)	<i>passim</i>
<i>Easterwood v. CSX Transp., Inc.</i> , 933 F.2d 1548 (11th Cir. 1991)	<i>passim</i>
<i>Edwards v. Consolidated Rail Corp.</i> , 567 F. Supp. 1087 (D.D.C. 1983), <i>aff'd</i> , 733 F.2d 966 (D.C. Cir.), <i>cert. denied</i> , 469 U.S. 883 (1984)	14
<i>Flynn v. Howard</i> , Civ. 89 CO 21 (Dist. Ct. N.D. 1989)	14
<i>General Motors Corp. v. United States</i> , — U.S. —, 110 S.Ct. 2528 (1990)	9
<i>Hatfield v. Burlington Northern R. Co.</i> , 757 F. Supp. 1198 (D. Kan. 1991)	13
<i>Karl v. Burlington Northern R. Co.</i> , 880 F.2d 68 (8th Cir. 1989)	8, 13
<i>Mahoney v. CSX Transp., Inc.</i> , No. 4:88-CV-13- HLM (N.D.Ga. Feb. 6, Apr. 6, 1990)	13
<i>Marshall v. Burlington Northern, Inc.</i> , 720 F.2d 1149 (9th Cir. 1983)	5, 6, 8, 13
<i>Missouri Pacific R. Co. v. Railroad Comm'n of Texas</i> , 833 F.2d 570 (5th Cir. 1987)	14
<i>National Ass'n of Regulatory Util. Comm'rs v. Coleman</i> , 542 F.2d 11 (3d Cir. 1976)	10, 14
<i>Nixon v. Burlington Northern R.</i> , No. CV85-384- BLG (1988 WESTLAW 215409) (D. Mont. 1988) ..	14
<i>Rayner v. Smirl</i> , 873 F.2d 60 (4th Cir. 1989), <i>cert. denied</i> , 110 S.Ct. 213 (1990)	10

TABLE OF AUTHORITIES—Continued

	Page
<i>Russell v. Southern Railway Co.</i> , Civ. Act. No. CV289-059 (S.D. Ga. Feb. 14, 1990)	13
<i>Russello v. United States</i> , 464 U.S. 16 (1983)	9
<i>Singer v. Southern Ry Co.</i> , Civ. 88 CVS 3898 (N.C. Sup. Ct. 1989)	14
<i>Sisk v. National R.R. Passenger Corp.</i> , 647 F. Supp. 861 (D. Kan. 1986)	14
<i>Smith v. Norfolk and Western Ry. Co.</i> , — F. Supp. —, 1991 WESTLAW 230174 (N.D. Ind. 1991)	13
<i>Southern Pacific Transp. Co. v. Maga Trucking Co.</i> , 758 F. Supp. 608 (D. Nev. 1991)	13
<i>Southern Railway Co. v. Georgia Kraft Co.</i> , 188 Ga. App. 623, 373 S.E.2d 774 (1988)	14
<i>Taylor v. St. Louis Southwestern Ry. Co.</i> , 746 F. Supp. 50 (D. Kan. 1990)	14
<i>Watt v. Alaska</i> , 451 U.S. 259 (1981)	6
STATUTES AND REGULATIONS:	
23 C.F.R. Parts 646 and 924	3, 11
23 U.S.C. § 130	5
23 U.S.C. § 401-404	5
45 U.S.C. § 433	11
45 U.S.C. § 433(b)	11
45 U.S.C. § 434	<i>passim</i>
45 U.S.C. § 435(a)	9
45 U.S.C. § 436(a)(1)	9
45 U.S.C. § 437(a)	9
45 U.S.C. § 437(c)	9
OTHER:	
AAR 1990 Report of Claims and Litigation Expe- rience at 2-12	14
Brief for the United States As Amicus Curiae at 6, <i>Public Utilities Commission of Ohio v. CSX Transportation, Inc.</i> , On Petition For a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, No. 90-95, October Term, 1990	7

TABLE OF AUTHORITIES—Continued

	Page
H.R. Rep. No. 1194, 91st Cong., 2d Sess. 11, <i>re-</i> <i>printed in U.S. Code Cong. & Admin. News</i> 4104	10, 11
Supreme Court Rule 10.1 (a)	12
Supreme Court Rule 10.1 (c)	12

IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-790

CSX TRANSPORTATION, INC.,
v. *Petitioner,*
LIZZIE BEATRICE EASTERWOOD,
Respondent.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit**

**BRIEF *AMICUS CURIAE* OF THE
ASSOCIATION OF AMERICAN RAILROADS
IN SUPPORT OF PETITIONER**

INTEREST OF *AMICUS CURIAE*

The interest of *amicus curiae* is set forth in accompanying Motion For Leave To File Brief *Amicus Curiae*.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the 1970 Federal Railroad Safety Act ("FRSA"), Congress explicitly provided that federal regulations promulgated by the Secretary of Transportation would preempt state regulations relating to railroad safety.¹ 45

¹ The statute does provide for a narrow exception to the preemption provision. Even when the Secretary has adopted regulations covering the subject matter, a state may adopt additional or more stringent regulations when it is "necessary to eliminate or

U.S.C. § 434. This case presents an important and recurring issue that has divided federal circuit courts: whether federal railroad safety regulations promulgated by the Secretary pursuant to statutes other than FRSA preempt state regulations relating to railroad safety on the same subject matter. Because neither the language nor the background of the statute restricts the preemptive power of the Secretary's railroad safety regulations to those promulgated pursuant to FRSA, *amicus* urges this Court to grant certiorari to establish the preemptive authority of all federal regulations relating to railroad safety issued by the Secretary, regardless of the statute pursuant to which the regulation was promulgated.

This case arises from a fatal traffic accident at the Cook Street railroad crossing in Cartersville, Georgia. Respondent's husband, Thomas Easterwood, was killed when his truck collided with a CSX train at a grade crossing. Mr. Easterwood's widow filed an action for wrongful death in the district court, alleging, in part, that CSX had negligently failed to install adequate warning signals at the Cook Street crossing.² CSX moved for summary judgment, arguing, among other things, that FRSA precluded a state law negligence action against the railroad based on an allegedly inadequate warning signal at a grade crossing because state regulation of matters relating to railroad safety is preempted when federal regulations are issued on the same subject matter.

reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce." 45 U.S.C. § 434. This exception is not relevant to this case. *Easterwood v. CSX Transp., Inc.*, 933 F.2d 1548, 1553 n.3 (11th Cir. 1991).

² Mrs. Easterwood also alleged negligence in operating the train at unsafe speeds, in failing to level a hump in the road, and in allowing vegetation to grow along the track which interfered with the decedent's vision of the train. Other claims raised in the complaint were dropped before summary judgment. None of these claims is relevant to this proceeding.

Section 434 of 45 U.S.C. provides:

The Congress declares that laws, rules, regulations, orders and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order or standard covering the subject matter of such State requirement.

CSX noted that the Secretary of Transportation had adopted regulations governing the precise subject matter at issue below, which are codified at 23 C.F.R. Parts 646 and 924, and that these grade crossing regulations preempt the state negligence standard. The district court agreed and granted summary judgment to CSX. *Easterwood v. CSX Transp., Inc.*, 742 F. Supp. 676 (N.D. Ga. 1990). Plaintiff appealed the decision to the United States Court of Appeals for the Eleventh Circuit.

The panel for the Eleventh Circuit discussed at length the preemption-provision of the FRSA. *Easterwood v. CSX Transp., Inc.*, 933 F.2d 1548, 1552-53 (11th Cir. 1991). The court noted:

The legislative history makes clear that because Congress was concerned with the problems created by the hodgepodge of state regulations it explicitly stated that it intended to pre-empt all state regulations covering the same subject matter as the federal regulations. Therefore, our initial task is to examine each claim and determine if any federal regulations have been promulgated which cover the conduct at issue. In such cases, we will find explicit federal pre-emption

Id. at 1553 (discussing 45 U.S.C. § 434). However, while the court acknowledged that the Secretary *had* issued regulations at 23 C.F.R. Parts 646 and 924 which covered the subject of grade-crossing signals, it held that because those regulations were promulgated pursuant to the Federal Highway Safety Act (23 U.S.C. § 130), rather than pursuant to FRSA, the federal regulations

were not expressly preemptive. Because there was no explicit preemption provision in the Federal Highway Safety Act, and because the court perceived no intent of Congress to occupy the field, the court held that the federal regulations did not preempt the state law of negligence.

REASONS FOR GRANTING THE WRIT

The decision of the Eleventh Circuit in this case conflicts with decisions of the Sixth and Ninth Circuits on the issue of whether federal regulations preempt state standards relating to railroad safety. Given this conflict in the Circuits, this Court should, without more, grant certiorari in this matter. Additionally, the issue raised in the petition for certiorari is an important one as it impacts directly on railroad safety. Congress has explicitly expressed its intent that railroad safety standards must be "nationally uniform to the extent practicable." 45 U.S.C. § 434. The lower court's rule in this case is squarely at odds with this clear congressional command and effectively subverts the congressional goal of a nationally uniform and safe railroad system. Moreover, the issue is a recurring one; trial judges nationwide face efforts to regulate railroad safety through state tort law on a continuing basis and they require the guidance of this Court.

I. THE DECISION OF THE ELEVENTH CIRCUIT IS IN CONFLICT WITH DECISIONS OF THE SIXTH AND NINTH CIRCUITS.

Although the Eleventh Circuit in the decision below recognized the preemptive effect of section 434, it concluded that unless the Secretary promulgates a regulation pursuant to FRSA specifically, that regulation does not have the preemptive effect of section 434 even though it relates to railroad safety. *Easterwood*, 933 F.2d at 1555. Thus, because the federal regulations relating to warning signals and devices at railroad grade crossings were promulgated pursuant to the Federal Highway

Safety Act (23 U.S.C. § 130), the court held that they did not have the express preemptive effect dictated by section 434 of the FRSA.

The panel below recognized that its decision conflicted with the Ninth Circuit's decision in *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149 (9th Cir. 1983). There, Burlington Northern argued that evidence of the adequacy of the railroad crossing warning devices should not have been admitted at trial because federal regulation on that subject preempted the common law negligence standard. Then-judge (now Justice) Kennedy noted that states were precluded by FRSA from regulating the "same subject matter" already regulated by the Secretary. The *Marshall* court went on to hold that even though the rules relating to railroad grade crossings were promulgated pursuant to the federal Highway Safety Act (23 U.S.C. § 401-404), rather than the FRSA, the Secretary had properly "delegated federal authority to regulate grade crossings to local agencies" and those regulations *would* have the preemptive effect mandated by the FRSA. *Id.* at 1154. Thus, regardless of the statutory authority on which the Secretary relied to promulgate a regulation, that regulation preempts any state regulation on the same subject that relates to railroad safety.

The *Marshall* court did not question the preemptive power of section 434, even for regulations promulgated pursuant to another act. However, a second issue in *Marshall* was the question of when the preemption actually occurs. The Ninth Circuit held that because the Secretary had delegated his authority to local agencies to implement the regulations at each particular grade-crossing, a "federal decision" was not made until the local agency had made a determination with respect to the grade-crossing at issue. Indeed, the district court in the case below followed *Marshall*, and held that although the local agency had originally evaluated the Cook Street crossing and determined to put up gate arms, it later decided to put the funds for the Cook Street project into

other projects. The court held that the local agency had exercised the power delegated to it by the Secretary. "DOT made a decision not to install gate arms at the Cook Street crossing when it transferred the funds to other projects and removed the Cook Street crossing from the list of crossings to receive gate arms." *Easterwood*, 742 F. Supp. at 678.

In reviewing the district court decision, however, the Eleventh Circuit held that even if *Marshall* were correct on the preemptive scope of section 434, preemption would not apply in this case because, contrary to the district court's finding, the local agency had *not* made a decision. The court focused on the "financial constraints and logistical problems" that precluded the upgrade and concluded that because the agency had neither upgraded "nor affirmatively decided that the existing crossing was adequate," the agency had failed to act, and a failure to act is not a decision. *Easterwood*, 933 F.2d at 1555. This finding is not in accordance with *Marshall*, as the district court's more reasoned approach illustrates. Moreover, the question of what the DOT did is one of fact. Given the conflict in evidence, the district court's findings regarding the credibility of the evidence must control. Therefore, this alternative ground for the Eleventh Circuit's decision should not preclude the grant of certiorari.³

³ *Amicus* contends that both courts are wrong on this question of timing. The statute provides that a state may regulate safety issues "until such time as the Secretary has adopted a . . . regulation . . . covering the subject matter of such State requirement." 45 U.S.C. § 434 (emphasis added). The language of the statute controls the scope of the preemption. See *Watt v. Alaska*, 451 U.S. 259, 265-66 (1981). There can be no question that the regulations, which are specifically directed at grade-crossing devices, "cover the subject matter" of state tort law standards on grade crossing devices. Further, the Secretary *adopted* the regulations regarding grade crossings *when they were issued* in the Secretary's name and by his authority. That those regulations delegated some authority to local agencies responsible for highway safety does not mean they

The decision below also conflicts with the Sixth Circuit's decision in *CSX Transp., Inc. v. Public Utilities Comm'n of Ohio*, 901 F.2d 497 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 781 (1991) (hereafter "PUCO"). In *PUCO*, a group of railroads sought a declaratory judgment that regulations issued by the state of Ohio regarding transportation of hazardous materials by rail were invalid because federal regulation on that subject preempted state regulation. The Sixth Circuit held that because the federal regulations regarding transportation of hazardous materials by rail were regulations "relating to railroad safety" which were promulgated by the Secretary, they were preemptive under the FRSA preemption provision. In reaching this holding even though the Secretary of Transportation promulgated the regulations pursuant to the Hazardous Materials Transportation Act, not the FRSA, the Sixth Circuit squarely rejected the conclusion now reached by the Eleventh Circuit. "FRSA preemption relates to *all* rules and regulations regarding railroad safety *promulgated by the Secretary*, whether or not such regulations are promulgated by the FRA through power delegated by the Secretary." *Id.* at 501.

are not regulations, or that the Secretary has not adopted them. Significantly, there is no provision that the Secretary review the decision of the local agency; the Secretary has no opportunity after delegating the power to "adopt" any decision made by the local agency.

If the Secretary has promulgated or adopted regulations, the fact that those regulations delegate some power to implement those regulations is irrelevant for preemption purposes. Consequently, whether the local agency responsible for the grade crossing at issue has made a "decision" or not in a particular case is legally irrelevant to the determination of whether federal regulations preempt state law on matters relating to railroad safety.

Finally, there is also a conflict among the lower courts on this timing question. Compare *Armijo v. Atchison, Topeka, & Santa Fe Ry Co.*, 754 F. Supp. 1526, 1531 (D.N.M. 1990) (state law preempted "when Secretary passed regulation," rather than when local agency made determination) with *Marshall*, *supra*.

Moreover, when the defendants in *PUCO* petitioned this Court for a writ of certiorari, this Court requested the United States, which was not a party to the action, to submit a brief *amicus curiae* on the preemption issue. The United States did submit such a brief and took the position urged by *amicus* here, arguing forcefully that although the regulations at issue in that case “were issued under the authority of the HMTA, not FRSA, nothing in the language, structure, or background of either statutory scheme prevents such regulations from serving as the basis for preemption under FRSA’s broad preemption provision.” Brief for the United States As Amicus Curiae at 6, *Public Utilities Commission of Ohio v. CSX Transportation, Inc.*, On Petition For a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, No. 90-95, October Term, 1990.⁴ Thus, the United States has already taken a position in this Court that strongly undermines the view now taken by the Eleventh Circuit.

Both *Marshall* and *PUCO* conflict with the holding of the Eleventh Circuit in *Easterwood*.⁵ Yet only *Marshall* and *PUCO* are consistent with the language of the statute and the legislative history which lies behind it. Under proper preemption analysis, the courts must look first to the language of the explicit preemption provision. As this Court held in *Watt v. Alaska*, 451 U.S. 259, 265-66 (1981), the plain language of a statute is given great weight.

⁴ This Court denied certiorari. 111 S.Ct. 781 (1991).

⁵ Indeed, the only known appellate holding in agreement with *Easterwood* is *Karl v. Burlington Northern Railroad Co.*, 880 F.2d 68 (8th Cir. 1989). In *Karl*, however, the court appears to have simply ignored the express preemption provision of 45 U.S.C. § 434. The court concluded that the state tort law standards regarding grade-crossings were not preempted because the federal regulation did not occupy the field and because there was no actual conflict between state and federal law. Given the court’s failure to discuss the critical focus of this case—the explicit preemption provision—the decision can be accorded little weight.

The language of the statute in this case provides that a state may continue a rule or standard in effect “until such time as the Secretary has adopted a rule regulation, order, or standard covering the subject matter of such State requirement.” 45 U.S.C. § 434. The statute particularly does *not* provide that the state regulations will remain in effect until the Secretary had adopted a rule, regulation, order or standard “pursuant to this chapter” or “pursuant to this subchapter.” It is a telling point that Congress did include that limiting language elsewhere in the very same Act when it specifically restricted the scope of other provisions of FRSA to regulations issued under that chapter.⁶ The absence of such a limitation in the preemption provision of FRSA indicates that Congress did not desire to so limit the preemption provision. See *General Motors Corp. v. United States*, — U.S. —, 110 S. Ct. 2528, 2582 (1990); *Russello v. United States*, 464 U.S. 16, 23 (1983). Thus, both the language and structure of FRSA support the conclusion that Congress intended the preemptive effect of section 434 to extend to *all* laws, rules, regulations, orders, and standards “relating to railroad safety” regardless of whether they are promulgated pursuant to FRSA or not.

⁶ See, e.g., 45 U.S.C. § 435(a) (allowing State participation in investigative and surveillance activities in connection with regulations “prescribed by the Secretary *under this subchapter*”) (emphasis added); 45 U.S.C. § 436(a)(1) (authorizing enforcement of civil penalties with respect to violations of “railroad safety rule, regulation, order, or standard issued *under this subchapter*”) (emphasis added); 45 U.S.C. § 438 (same); 45 U.S.C. § 437(a) (“The Secretary is further authorized to issue orders directing compliance with this chapter or with any railroad safety rule, regulation, order, or standard *issued under this subchapter*.”) (emphasis added); 45 U.S.C. § 437(c) (“All orders, rules, regulations, standards, and requirements in force or prescribed or issued by the Secretary *under this subchapter* . . . shall have the same force and effect as a statute for purposes of [other sections of the title.]”) (emphasis added).

Moreover, the extensive legislative history emphasizes what the language of the statute accomplishes: that Congress intended *any* regulation issued by the Secretary, covering the same subject matter as a state regulation relating to railroad safety, to preempt the state law. In drafting and passing FRSA, Congress, increasingly concerned with safety issues relating to railroads, determined that the old, dual system of state and federal regulation of safety issues was inadequate to insure an acceptable level of safety in operations of the nation's railroads. Noting that "[r]ailroad safety is wide in scope and requires a more comprehensive national approach," H.R. Rep. No. 1194, 91st Cong., 2d Sess. 11, *reprinted in* U.S. Code Cong. & Admin. News 4104, 4114 (hereafter "House Report"), Congress expanded the Department of Transportation's authority to regulate to "all areas of railroad safety." *Id.* at 4127.

In addition, Congress restricted the ability of states to regulate issues of railroad safety; indeed, the states are explicitly precluded from regulating those issues when the Secretary has adopted a regulation covering the same subject matter. Congress purposely limited the states' role because it "[d]id not believe that safety in the Nation's railroads would be advanced sufficiently by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems." *Id.* at 4109. *See also, Rayner v. Smirl*, 873 F.2d 60 (4th Cir. 1989) (if state actions were to be allowed where federal regulations already exist, "railroad safety laws might be subject to an unpredictable medley of jury determinations, which Congress in its quest for national uniformity under section 434 sought to avoid"), *cert. denied*, 110 S. Ct. 213 (1990); *National Ass'n of Regulatory Util. Comm'rs v. Coleman*, 542 F.2d 11 (3d Cir. 1976) (Congress' goal of nationally uniform safety regulations can only be achieved through a preemption of state requirements).

Finally, the legislative history indicates specifically that limiting FRSA preemption provision to regulations prom-

ulgated pursuant to FRSA alone is inconsistent with Congress' intent in passing FRSA. At the time FRSA was enacted, the Secretary had diverse sources of statutory authority, enacted over many years, to regulate railroad safety issues. Congress recognized these multiple sources of authority and determined not to combine them all (and their accompanying regulations) into FRSA, but rather to leave them extant.⁷ Indeed, the House Report indicates that in addition to the pre-existing authority to regulate many railroad safety issues, "the new authority will be implemented with respect to those areas of rail safety not now subject to federal jurisdiction." House Report at 4114. In enacting a categorical preemption provision, without in any way limiting this provision to regulations issued pursuant to FRSA, Congress acted to ensure that the Secretary's multi-statute regulatory authority would achieve uniform safety regulation.

Significantly, in 45 U.S.C. § 433, while directing the Secretary to undertake a comprehensive study of grade crossings,⁸ Congress also directed the Secretary, "under the authority provided by this subchapter and pursuant to his authority over highway, traffic, and motor vehicle safety, and highway construction," to develop and implement solutions to the grade crossing problem. *Id.* at § 433(b). In fact, that is just what the Secretary did with respect to grade crossings in 23 C.F.R. Parts 646 and 924. As this illustrates, Congress was well aware of the interrelationship between the Secretary's diverse statutory authority when it established a broad preemption

⁷ The Committee report states its intent to "make clear that this grant of jurisdiction does not replace existing rail safety statutes and implementing regulations . . ." House Report at 4114.

⁸ Specifically with respect to grade-crossings, Congress ordered the Secretary to study the national problem of dangerous grade crossings and report back to Congress with recommendations. 45 U.S.C. § 433. In response to those reports, Congress enacted the 1973 changes to the federal Highway Safety Act, amending its provision on grade crossing safety.

provision that makes no differentiation between the Secretary's rail safety regulations based on the particular statute that is the source of the regulations.

Both the language and the history of the statute mandate that the conflict in the circuits must be resolved against the reasoning of the *Easterwood* court. Given Congress' refusal to limit the preemption provision to regulations promulgated pursuant to FRSA, although it so limited other provisions, and Congress' explicit intent to achieve a uniform system of rail safety regulation, this Court should grant certiorari to resolve the conflict and find that the regulations regarding grade crossings preempt state tort law standards regarding grade crossings.

II. THE QUESTION OF FEDERAL PREEMPTION OF RAILROAD SAFETY REGULATIONS IS AN IMPORTANT ONE.

The conflict in the circuits on the question of preemption would, alone, justify plenary review. See Supreme Court Rule 10.1(a). Certiorari should also be granted because this case involves an important question of federal law which has not been, but should be settled by this Court. See Supreme Court Rule 10.1(c). Although the specific question in this case is whether state regulation of grade-crossing signals and devices is preempted by the federal regulations on that subject, the answer to that question implicates the larger question of whether state rules, regulations, or standards relating to railroad safety are preempted by federal regulations on the same subject which are promulgated by the Secretary of Transportation pursuant to statutes other than FRSA.

This question is an important one for several reasons. First, uniformity of law, while always desirable, assumes increased urgency in cases involving railroads which are part of a national network. The importance of uniformity of regulation with respect to railroads was emphasized by Congress in its deliberations about FRSA:

With the exception of industrial or plant railroads, the railroad industry has very few local characteristics. Rather, in terms of its operations, it has a truly interstate character, calling for a uniform body of regulation and enforcement. It is a national system. Unlike the gas pipelines, the vast bulk of railroad mileage, and operations thereover, are by companies whose operations extend over many States lines. . . . In addition to the obvious areas of rolling stock and employees, such elements as operating rules, signal systems, power supply systems, and communications systems of a single company normally cross numerous State lines. To subject a carrier to enforcement before a number of different State administrative and judicial systems in several areas of operation could well result in an undue burden on interstate commerce.

House Report at 4110-4111. The same undue burden results from varying decisions regarding preemption which regulate the railroads in varying circuits.

Moreover, the preemption issue as related to railroad safety regulations appears repeatedly through the nation's courts. Since 1986, at least seventeen courts have considered the *specific* question of whether federal regulations regarding grade-crossing signals and devices preempt state common law negligence standards in claims against railroads.⁹ Many other courts have considered

⁹ *Easterwood v. CSX Transp., Inc.*, 933 F.2d 1548 (11th Cir. 1991); *Karl v. Burlington Northern R. Co.*, 880 F.2d 68 (8th Cir. 1989); *Marshall v. Burlington Northern R. Co.*, 720 F.2d 1149 (9th Cir. 1983); *Smith v. Norfolk and Western Ry. Co.*, — F. Supp. —, 1991 WESTLAW 230174 (N.D. Ind. 1991); *Southern Pacific Transp. Co. v. Maga Trucking Co.*, 758 F. Supp. 608 (D. Nev. 1991); *Hatfield v. Burlington Northern R. Co.*, 757 F. Supp. 1198 (D. Kan. 1991); *Anderson v. Chicago Cent. And Pacific R. Co.*, 771 F. Supp. 227 (N.D. Ill. 1991); *Mahoney v. CSX Transp., Inc.*, No. 4:88-CV-13-HLM (N.D.Ga. Feb. 6, Apr 1990); *Russell v. Southern Railway Co.*, Civ. Act. No. CV289-059 (S.D. Ga. Feb. 14, 1990); *Armijo v. Atchison, Topeka, & Santa Fe Ry. Co.*, 754 F. Supp. 1526

the same preemption issue in the context of other regulations about cabooses, *e.g.*, *Burlington Northern R. Co. v. State of Montana*, 880 F.2d 1104 (9th Cir. 1989), railroad walkways near track structures, *e.g.*, *Missouri Pacific R. Co. v. Railroad Comm'n of Texas*, 833 F.2d 570 (5th Cir. 1987), speed limits, *e.g.*, *CSX Transp., Inc. v. City of Tullahoma, Tenn.*, 705 F. Supp. 385 (E.D. Tenn. 1988), transportation of hazardous materials, *e.g.*, *PUCO*, 901 F.2d 497, railroad accident reporting requirements, *e.g.*, *National Ass'n of Regulatory Utility Comm'rs v. Coleman*, 542 F.2d 11 (3d Cir. 1976), and signs at catenary crossings, *Edwards v. Consolidated Rail Corp.*, 567 F. Supp. 1087 (D.D.C. 1983), *aff'd*, 733 F.2d 966 (D.C. Cir.), *cert. denied*, 469 U.S. 883 (1984). In view of this level of activity, and in view of the fact that in 1990 alone, 4,274 claims and suits involving grade-crossing accidents were brought against railroads, it is essential that this continually recurring issue be resolved. AAR 1990 Report of Claims and Litigation Experience at 2-12.

Finally, this question is important because it implicates questions of undue burden on interstate commerce. In FRSA, Congress expressly indicated that railroads were not to be subject to the regulation of 50 different states because such multiple layers of regulation on an industry that is nationwide by its very nature would prove to be an undue burden on interstate commerce. Moreover, the regulations represent a decision that the responsibility for safety at grade crossings is a governmental one rather than a railroad one. In *Sisk v. Na-*

(D.N.M. 1990); *Taylor v. St. Louis Southwestern Ry. Co.*, 746 F. Supp. 50 (D. Kan. 1990); *Nixon v. Burlington Northern R.R.*, No. CV85-384-BLG (1988 WESTLAW 215409) (D. Mont. 1988); *CSX Transp., Inc. v. City of Tullahoma, Tenn.*, 705 F. Supp. 385 (E.D. Tenn. 1988); *Sisk v. National R.R. Passenger Corp.*, 647 F. Supp. 861 (D. Kan. 1986); *Singer v. Southern Ry Co.*, Civ. 88 CVS 3898 (N.C. Sup. Ct. 1989); *Flynn v. Howard*, Civ. 89 CO 21 (Dist. Ct. N.D. 1989); *Southern Railway Co. v. Georgia Kraft Co.*, 188 Ga. App. 623, 373 S.E.2d 774 (1988).

tional R.R. Passenger Corp., 647 F. Supp. 861, 863 (D. Kan. 1986) the court concluded,

In conjunction with the national regulation of railroad safety, Congress determined that grade crossing improvements were a governmental responsibility rather than the responsibility of the railroads The significance of the increased funding for railroad crossing improvement under the federal aid program is the government's recognition, in light of its desire to preserve a national railroad transit system, that public safety at crossings is a matter of concern to the government rather than the railroad, and thus requiring the railroads to share in the cost was overly burdensome.¹⁰

Holding railroads liable for improvements for which the railroads no longer have responsibility is also unduly burdensome, particularly in light of the fact that what is regulated and safe in terms of railroad crossings would be left to the discretion of juries across each state, rather than to those with expertise in the matter—the local highway planning authorities. Such a rule would lead to unpredictability of results, and unforeseeable, expensive burdens on the railroads.

¹⁰ As the court in *Armijo v. Atchison, Topeka & Santa Fe Ry. Co.*, 754 F. Supp. 1526, 1531 (D.N.M. 1990) noted,

Federal law delegates to the public agency having jurisdictional authority, and not to the railroad, the responsibility for and the authority for determining the need for and the selection of appropriate railroad-highway grade crossing signals.

CONCLUSION

For all the foregoing reasons, as well as those set forth in the Petition for Certiorari, this Court should grant certiorari.

Respectfully submitted,

JOHN H. BROADLEY
DAVID W. OGDEN *
KIT PIERSON
JULIE M. CARPENTER
JENNER & BLOCK
601 Thirteenth Street, N.W.
Twelfth Floor
Washington, D.C. 20005
(202) 639-6000

ROBERT W. BLANCHETTE
Vice President-Law and
General Counsel
ASSOCIATION OF AMERICAN
RAILROADS
American Railroads Building
50 F Street, N.W.
Washington, D.C. 20001
(202) 639-2505

Counsel for Amicus

* Counsel of Record

December 18, 1991

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IN THE
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OCTOBER TERM, 1992

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v. *Petitioner,*

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CSX TRANSPORTATION, INC.,
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On Writs of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

JOINT APPENDIX

JAMES I. PARKER
TAMBRA PANNELL COLSTON
WILLIAM L. LUNDY, JR.
PARKER & LUNDY
P.O. Box 1018
Cedartown, GA 30125
(404) 748-5643
Counsel for Respondents

HOWARD J. TRIENENS
CARTER G. PHILLIPS
MARK E. HADDAD
LAURA V. FARTHING
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

JACK H. SENTERFITT *
RICHARD T. FULTON
JAMES W. HAGAN
ALSTON & BIRD
1201 West Peachtree
Atlanta, GA 30309-3424
(404) 881-7000

Counsel for Petitioners

* Counsel of Record

August 27, 1992

TABLE OF CONTENTS

	Page
CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES	1
COMPLAINT AND DEMAND FOR JURY TRIAL....	3
ANSWER OF CSX TRANSPORTATION, INC.	7
AFFIDAVIT OF HAZEL STEPHENSON	12
AFFIDAVIT OF WENDALL A. HESTER	15
AFFIDAVIT OF W.D. MURRAY	19
DEPOSITION OF VIRGIL PRATHER	21
DEPOSITION OF JIM F. KELLEY	23
DEPOSITION OF WILLIAM FOGARTY, PHD	26
DEPOSITION OF ARCHIE C. BURNHAM, JR.	28

**CHRONOLOGICAL LIST OF RELEVANT
DOCKET ENTRIES**

1. June 3, 1988—Complaint filed in U.S. District Court for the Northern District of Georgia
2. July 13, 1988—Stipulation Extending Time to Answer or Respond filed in U.S. District Court for the Northern District of Georgia
3. August 8, 1988—Answer filed by CSX Transportation, Inc. in the U.S. District Court for the Northern District of Georgia
4. December 19, 1989—Motion for Summary Judgment with Statement of Material Facts and Supporting Brief filed by CSX Transportation, Inc. in the U.S. District Court for the Northern District of Georgia
5. January 5, 1990—Response in Opposition to Motion for Summary Judgment filed by Lizzie B. Easterwood in the U.S. District Court for the Northern District of Georgia.
6. January 22, 1990—Objections to Plaintiff's Affidavits or Portions Thereof filed by CSX Transportation, Inc. in U.S. District Court for the Northern District of Georgia
7. January 22, 1990—Reply Brief to Response of Lizzie B. Easterwood filed by CSX Transportation, Inc.
8. February 9, 1990—Order Granting Lizzie B. Easterwood's Request for Oral Argument on Motion for Summary Judgment entered in the U.S. District Court for the Northern District of Georgia
9. April 4, 1990—Transcript of Oral Argument and Hearing on Motion for Summary Judgment filed in the U.S. District Court for the Northern District of Georgia
10. August 9, 1990—Order Granting Motion for Summary Judgment and Denying Lizzie B. Easterwood's Motion for Reconsideration entered in the U.S. District Court for the Northern District of Georgia

11. September 6, 1990—Notice of Appeal filed by Lizzie B. Easterwood in the U.S. District Court for the Northern District of Georgia
12. June 20, 1991—Opinion and Judgment of the United States Court of Appeals for the Eleventh Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

Civil Action File No. 4:88-CV-0141-RLV

MRS. LIZZIE BEATRICE EASTERWOOD,
Plaintiff,

vs.

CSX TRANSPORTATION,
Defendant.

COMPLAINT AND DEMAND FOR JURY TRIAL

[Filed June 3, 1988]

The complaint of Mrs. Lizzie Beatrice Easterwood respectfully shows unto the Court the following case:

1.

Plaintiff names as defendant CSX Corporation which is a foreign railroad corporation with its home office located at One James Center, Richmond, Virginia 23261.

2.

Plaintiff shows that on February 24, 1988, she was married to Thomas Ray Easterwood and lived with him at Habersham Estates, Cartersville, Georgia.

3.

Plaintiff shows that she is a resident of Bartow County, Georgia.

4.

Plaintiff shows that on the 24th day of February, 1988, her husband was struck and killed by a speeding train at the Cook Street crossing of defendant's railroad track in the City of Cartersville, Bartow County, Georgia.

5.

Plaintiff shows that at said time and place her deceased husband was lawfully upon the crossing driving a certain 1985 International truck owned by his employer, Duncan Wholesale Company, Inc.

6.

Plaintiff shows that the intersection named above is a very busy intersection in the City of Cartersville, Georgia, and that at the time of her decedent's death it was approximately 8:52 a.m.

7.

Plaintiff shows that on said date her deceased husband was 58 years of age and in excellent health.

8.

Plaintiff shows that the death of her husband was the direct and proximate result of the negligence of defendant in the following particulars:

(a) Defendant's train crew was operating the train at a speed that was greater than reasonable and safe at that time and place.

(b) Defendant's crossing was unsafe in that Defendant's crossing was at the top of a hump in Cook Street that caused drivers to have difficulty in crossing it.

(c) Defendant's crossing was unsafe in that Defendant's right of way on the west side of the track north of the intersection was permitted to be covered by heavy

vegetation obscuring the vision of drivers on Cook Street of approaching trains and of approaching drivers on Cook Street to operators of trains on defendant's track.

(d) Defendant's crossing was unsafe in that the crossing is adjacent to a busily traveled thoroughfare known as Tennessee Street which is also a State Highway.

(e) Defendant's crossing was unsafe in that it is just a few feet west of the connection between Tennessee Street and Cook Street where traffic constantly turns from one to the other in different directions.

(f) Defendant's crossing was very very rough and uneven.

(g) Defendant failed to maintain adequate warning devices at the crossing to warn plaintiff's decedent and other drivers of the approach of speeding trains from the north.

9.

As a result of the negligence of defendant in the maintenance of its crossing and operation of its train, plaintiff's husband was killed, and she is entitled to be compensated in money damages for her loss in an amount in excess of \$10,000, exclusive of interest and costs, by defendant and in such an amount as may be determined by a jury that will fairly compensate her for the full value of the life of her deceased husband.

WHEREFORE, Plaintiff demands judgment in an amount to be determined by a jury that will fairly compensate her for the full value of the life of her deceased husband, Thomas Ray Easterwood.

PARKER AND LUNDY

By: /s/ James I. Parker
JAMES I. PARKER—562600

By: /s/ William L. Lundy, Jr.
 WILLIAM L. LUNDY, JR.
 461185
 Attorneys for Plaintiff

P.O. Box 1018
 Cedartown, Georgia 30125
 404-748-5643

IN THE UNITED STATES DISTRICT COURT
 NORTHERN DIVISION OF GEORGIA
 ROME DIVISION

Case No. 4:88-cv-0141-RLV

MRS. LIZZIE BEATRICE EASTERWOOD,
Plaintiff,
 vs.

CSX TRANSPORTATION, INC.,
Defendant.

ANSWER OF CSX TRANSPORTATION, INC.

[Filed Aug. 8, 1988]

Comes Now CSX Transportation, Inc. ("CSXT"), defendant in the above-styled matter, and by way of Answer shows the Court the following:

FIRST DEFENSE

Plaintiff's Complaint fails to state a claim against this defendant upon which relief can be granted.

SECOND DEFENSE

Plaintiff's Complaint against CSXT is barred for the reason that the collision described in said Complaint, and the death of Thomas Ray Easterwood, together with any and all other alleged injuries, were caused solely, proximately and directly by the negligence of plaintiff Thomas Ray Easterwood.

THIRD DEFENSE

Plaintiff's Complaint against this defendant is barred by the reason that the collision described in the Complaint, and the death of Thomas Ray Easterwood, to-

gether with all injury and damage alleged, was caused solely, proximately and directly by the failure of Thomas Ray Easterwood to comply with O.C.G.A. § 40-6-140 and stop the vehicle he was driving short of the railroad grade crossing when electrical signal devices warned of the immediate approach of the train, and when the train was plainly visible and in hazardous proximity to the crossing, said failures constituting negligence *per se* on the part of Thomas Ray Easterwood.

FOURTH DEFENSE

Plaintiff's Complaint against this defendant is barred by reason of the fact that the negligence of Thomas Ray Easterwood was equal to or greater than any alleged negligence on the part of CSXT which latter alleged negligence is expressly denied by CSXT.

FIFTH DEFENSE

Plaintiff's Complaint against CSXT is barred for the reason that any damage, death or injury alleged in the Complaint were the result of an unavoidable accident.

SIXTH DEFENSE

Plaintiff's Complaint against CSXT is barred by reason of the doctrine of avoidance.

SEVENTH DEFENSE

Plaintiff's Complaint against CSXT is barred by reason of the fact that Thomas Ray Easterwood had the last clear chance to avoid the incident alleged in the Complaint and that plaintiff is therefore barred from recovery of the damages sought in the Complaint.

EIGHTH DEFENSE

Except as specifically admitted hereinafter, CSXT denies the allegations of plaintiff's Complaint, and each and every claim contained therein. Specifically answering the

allegations of plaintiff's Complaint, CSXT shows the Court the following:

1.

Responding to the allegations contained in paragraph 1 of the Complaint, CSXT states that the Complaint erroneously names CSX Corporation as defendant. By consent order, CSXT has been substituted as defendant and CSX Corporation dismissed. CSXT states by way of further response that it is a foreign corporation with its principle place of business in a state other than Georgia, and is authorized to do business in this state and in this district.

2.

CSXT is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2 and can neither admit or deny the same.

3.

CSXT is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 3 and can neither admit or deny the same.

4.

Responding to the allegations contained in paragraph 4, CSXT admits only that Thomas Ray Easterwood was killed in a truck-train collision occurring on February 24, 1988 in Cartersville, Bartow County, Georgia. Except as thus stated, CSXT denies that its train was "speeding" as alleged, expressly denies each and every other allegation in said paragraph 4, and further denies that it is in any way liable to plaintiff for the collision alleged.

5.

CSXT denies that Plaintiff's husband was "lawfully upon the crossing" as alleged in said paragraph. CSXT is without knowledge or information sufficient to form a

belief as to the truth of the remaining allegations contained in paragraph 5 and can neither admit or deny the same.

6.

CSXT admits that the train-truck collision occurred at approximately 8:52 a.m. CSXT is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 6 and can neither admit or deny the same. CSXT, however, expressly denies that it is in any way liable to plaintiff for the collision or injury alleged.

7.

CSXT is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 7 and can neither admit or deny the same.

8.

CSXT denies each and every allegation in paragraph 8 of the Complaint and expressly denies all subparts (a) through (g) thereof.

9.

CSXT denies the allegations contained in paragraph 9 of the Complaint and expressly denies that it is liable to plaintiff in any amount.

10.

CSXT denies each and every other allegation in plaintiff's Complaint not herein specifically admitted.

WHEREFORE, CSXT prays that plaintiff's Complaint be dismissed with all costs cast upon plaintiff, and for such other and further relief as this Court deems just and proper.

This 5th day of August, 1988.

ALSTON & BIRD

By: /s/ Jack H. Senterfitt
JACK H. SENTERFITT
635850

By: /s/ Richard T. Fulton
RICHARD T. FULTON
280592

1200 C&S National Bank Building
35 Broad Street
Atlanta, Georgia 30335
(404) 586-1500

(Certificate of Service Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

Civil Action File No. 4:88-CV-0141-RLV

MRS. LIZZIE BEATRICE EASTERWOOD,
Plaintiff,

v.

CSX TRANSPORTATION, INC.,
Defendant.

AFFIDAVIT OF HAZEL STEPHENSON

STATE OF GEORGIA

COUNTY OF BARTOW

Personally appearing before the undersigned officer duly authorized to administer oaths, Hazel Stephenson, and after being first duly sworn, states as follows:

1.

My name is Hazel Stephenson. I am over the age of majority and competent to make this Affidavit. I give this Affidavit based upon my own personal knowledge and belief as to the matters stated herein.

2.

I was an eyewitness to the train-vehicle incident involving Mr. Easterwood. I was in a car directly behind Mr. Easterwood, and had been following him before we reached the South Erwin Street intersection with Cook Street.

3.

I noticed that Mr. Easterwood was driving very slowly the entire time. At the South Erwin Street and Cook Street intersection, both Mr. Easterwood and I had to stop at a red light. While we were stopped at the red light, I heard the noise of a train coming south and heard the bells at the Cook Street crossing and heard the train whistle even though my windows were closed. I heard all of this as we waited at the red light.

4.

Mr. Easterwood made a right-hand turn from South Irwin Street onto Cook Street and I followed behind him. As we turned onto Cook Street, I noticed that the red light at the train crossing was flashing. This entire time I continued to hear the noise of the train approaching and knew that a train was approaching the Cook Street crossing.

5.

I followed Mr. Easterwood down Cook Street toward the crossing. As Mr. Easterwood got closer to the railroad crossing, he did not increase or decrease his speed but simply continued to drive very slowly toward the crossing. I stopped my car at the white line painted on the Cook Street pavement that indicates where motorists should stop when a train is approaching. Mr. Easterwood, however, continued over this white line, onto the crossing and into the path of the train.

6.

I did not see Mr. Easterwood make any attempts to slow his truck or stop prior to entering the railroad crossing, even though it was obvious that a train was approaching that crossing. During this entire time the flashing lights were operating, the train was blowing its whistle and the bells were ringing. The train was not

travelling at an abnormally high rate of speed and there was nothing to obstruct the view of the train.

This 13th day of December, 1989.

FURTHER AFFIANT SAITH NOT.

/s/ Hazel Stephenson
HAZEL STEPHENSON

Sworn to and subscribed before me this 13th day of December, 1989.

/s/ [Illegible]
Notary Public

Notary Public, Barlow County, Georgia
My Commission Expires May 6, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

Civil Action No. 4:88-CV-0141-RLV

MRS. LIZZIE BEATRICE EASTERWOOD,
Plaintiff,

v.

CSX TRANSPORTATION, INC.,
Defendant.

STATE OF GEORGIA
COUNTY OF FULTON

AFFIDAVIT

Personally appeared before me, the undersigned officer duly authorized to administer oaths, Mr. Wendall A. Hester, who deposes and states as follows:

I.

I am Wendall A. Hester, and I am over 18 years old of age. I am competent to make this affidavit and the statements herein are based on my personal knowledge and the records of the Georgia Department of Transportation kept under my supervision, direction, custody and control.

2.

I am employed by the State of Georgia in the Department of Transportation, Office of Traffic and Safety, as a Transportation Engineer IV.

3.

During the period of January 1, 1980 to the present, I served as Manager of the Department's Railroad-High-

way Grade Crossing Section. My major function was to administer the State and Federal funded Railroad Grade Crossing Safety Program.—Part of our section's activities includes the inspection and evaluation of grade crossings on a state-wide basis, and the preparation of Diagnostic and Engineering Inspection Reports for each crossing inspected. This inspection report includes the computation of a hazard index which is one of the tools used to aid in evaluating the relative hazard of each crossing.

4.

When I began as manager of the Railroad Section in January of 1980, plans were already in progress to replace and upgrade the existing flashing light signals at the West Avenue railroad crossing in Cartersville, Georgia with the newer combination flashing light and gate assembly. In engineering the circuit design for West Avenue, it was determined that the new type motion detector equipment would not be compatible with the existing signal equipment at the adjacent crossings in close proximity. These included the Leake Street, Main Street, Cherokee Street, and Cook Street crossings in Cartersville, Georgia. Therefore, it was decided to initiate projects to upgrade the flashing light signals and circuitry at these crossings.

5.

Plans for modifying the crossing signals at Leake Street, Main Street, and Cherokee Street were submitted to the Railroad in August of 1980. The new signals which included new circuitry and the combination flashing light gate assembly were installed at these crossings in December of 1981. These new signals were funded through our Federal and State Railroad Crossing Safety Program.

6.

Plans for upgrading the crossing signals at Cook Street were drawn up at the same time as the Leake Street,

Main Street and Cherokee Street crossings. However, because of the large crossing width, gates could not be designed to cover the crossing without constructing a traffic island in the street. Our plan for installing gates at the Cook Street crossing was submitted to the City of Cartersville through our District Office. This was necessary because Cook Street is a city street. The City rejected the plan as being too restrictive to the large volume of trucks using the crossing and therefore the plan was not submitted to the Railroad. Instead, we determined to leave Cook Street protected by the existing cantilever flashing light warning device.

7.

At the suggestion of the Railroad, we approved the Railroads' upgrade of the motion detector at Cook Street. This upgrade in equipment at Cook Street was desirable to insure frequency compatibility with the automatic detection devices installed at the adjacent West Avenue crossing and the cost for this upgrade was included in the estimated costs proposal prepared by the Railroad for the West Avenue crossing improvements and authorized and approved by my section. This cost estimated, No. 1534, was submitted to us on January 17, 1980 and was subsequently approved.

8.

Further affiant sayeth not.

This 30 day of November 1989.

/s/ Wendall A. Hester
WENDALL A. HESTER

Sworn to and subscribed before me, this 30th day of
November, 1989.

/s/ Melinda R. Boothe
Notary Public
My Commission Expires: —
Notary Public Cobb County, Georgia
My Commission Expires Aug. 29, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

Civil Action File No. 4:88-CV-0141-RLV

MRS. LIZZIE BEATRICE EASTERWOOD,
Plaintiff,

v.

CSX TRANSPORTATION, INC.,
Defendant.

AFFIDAVIT OF W. D. MURRAY

STATE OF GEORGIA

COUNTY OF FULTON

W. D. Murray, on oath first having been duly sworn,
depose and say the following:

1.

I am Roadmaster for CSX Transportation, Inc. ("CSXT"). The facts contained in this affidavit are of my own personal knowledge and based upon the knowledge of the operations and records of CSXT, and are true and correct. I am over 21 years of age and competent to give this affidavit for any use in the above styled case.

2.

My responsibilities include supervision of the engineering and maintenance functions of CSXT for that portion of the Atlanta Division which includes CSXT's main line track in Cartersville and specifically the Cook Street crossing.

3.

CSXT has installed train signals along its main line track including this location. This main line track is Class 4 track, and was Class 4 track as of February 24, 1988, which has a maximum allowable operating speed for freight trains of 60 miles per hour.

4.

Further affiant sayeth not.

/s/ W. D. Murray
W. D. MURRAY

Sworn to and subscribed before me this 13 day of December, 1989.

/s/ [Illegible]
Notary Public

Notary Public, Georgia, State at Large
My Commission Expires August 26, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

Civil Action No. 4:88-cv-0141-RLV

MRS. LIZZIE B. EASTERWOOD,
Plaintiff,

vs

CSX TRANSPORTATION, INC.,
Defendant,

APPEARANCES:

FOR THE PLAINTIFF:

William L. Lundy, Jr., Cedartown, Georgia

FOR THE DEFENDANT:

Jack H. Senterfitt, Esq., Atlanta, Georgia

The **DEPOSITION OF VIRGIL PRATHER** was taken at the instance of the plaintiff at the law offices of Alston and Bird, 100 Galleria Parkway, Marietta, Georgia, commencing at approximately eleven o'clock a.m., on the 19th day of December, 1988, before Brenda G. Watson, Notary Public and Court Reporter, pursuant to the stipulations of counsel.

* * * *

Q Okay. Can you tell me how fast you were going on February 24th, 1988, just prior to the impact?

A Approximately thirty-two miles an hour.

Q What do you base that speed on?

A Just prior to reaching the crossing, I looked at the speed recorder, which the engine—was available, and it was registering thirty-two miles per hour.

Q Okay. Now this speed recorder, can you please describe it for me.

A It is a thing that all the engines have. It is something like you would refer to as a speedometer on an automobile. But they refer to it as a speed recorder. It is basically just the same thing as a speedometer. It does not record the speed officially. I mean as far as making any kind of recording.

Q So how do you tell that thirty-two is the speed? Is it from a tape or a readout, or what is it you are looking for?

A By hand signal—a hand indication, like a—well, just like your speedometer, you know, on an automobile, basically the same thing.

Q Okay. Is there a continual recording of the speed as you travel down the track?

A You mean a declining or increase?

Q Either one?

A Yes.

Q Okay. Is that done on paper?

A No.

Q Or how is that recorded?

A No. There is no recording that you can go back and check.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

Civil Action File No. 4:88-CV-014T-RLV

MRS. LIZZIE B. EASTERWOOD,
Plaintiff,

vs

CSX TRANSPORTATION, INC.,
Defendant,

The **DEPOSITION OF JIM F. KELLEY**; taken by the Plaintiff; before Tracy A. Cooper, Certified Court Reporter and Notary Public; commencing at approximately 2:00 p.m., on January 27, 1989, in the offices of Greg Culverhouse, Cartersville, Georgia.

APPEARANCES

FOR THE PLAINTIFF:

William L. Lundy, Esquire

FOR THE DEFENDANT:

Theodore T. Carellas, Esquire

Richard T. Fulton, Esquire

* * *

[6] Q You are still working for CSX?

A Yes.

Q What is your capacity now?

A Supervisor of signals.

Q What does that mean exactly, supervisor of signals?

A I'm in charge of the maintenance on the train control and traffic control devices.

Q And do you remember about what time you arrived at the scene of this wreck?

A I don't recall the exact time, no.

Q Do you think it was before lunch time?

A It was before I had lunch.

Q And—was locomotive engine 3120 still below the Cook Street crossing when you arrived?

A No, it was not.

Q It had already been removed?

A Yes.

Q Now, why do you go to scenes of train/motor vehicle wrecks at grade crossings to investigate? Or it is to investigate the signal devices?

A To see that they are functioning as intended, yes.

* * *

[10] Q It doesn't depend on the weight of the locomotive engine to trip these warning devices?

A The weight—locomotive is so heavy, there are not different weights—light ones or some are heavier than others.

Q Doesn't have an effect on that?

A No, they all activate it.

Q Is the phase motion detector located before the crossing—can you tell me how far back from the actual grade crossing these phase motion detectors are located?

A The phase motion detector is located at the crossing.

Q What is it that's located before the crossing?

A It's the circuit termination shunts which are located approximately 1500 feet from the crossing.

Q Is that a consistent figure for all signal warning devices, 1500 feet before a grade crossing?

A It depends upon the application in each instance.

Q What do you mean by that?

A The speed the track should be—track speed.

Q I assume at the Cook Street crossing that these circuit termination shunts are located 1500 feet north of the Cook Street crossing?

A That's right. Also south.

A Also south 1500 feet. And that is based on an assumed speed of what?

[11] A 40 miles per hour giving a warning time of 25 seconds.

Q And I assume that you tested the circuit termination shunts and the phase motion detector and found it to be operational?

A I did.

Q You found it to be operating and functioning properly?

A I did.

Q There was nothing wrong with it?

A That's correct.

Q And it is your opinion that on the morning of February 24, when this southbound locomotive engine number 3120 crossed the circuit termination shunts activating the phase motion detector it was operating properly?

A That's my opinion, yes.

Q How long did your testing on the circuit termination shunts and the phase motion detector take that morning?

A Approximately 20 minutes.

Q Were you required to file a report on it's function?

A The signal maintainer, that was his responsibility.

Q Who was that, Mr. Sheriff?

A Dale Sheriff.

Q Was he there with you that morning?

A No, he had already left when I arrived.

* * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT
ROME DIVISION

Civil Action Case No. 4:88-CV-0141-RLV

MRS. LIZZIE BEATRICE EASTERWOOD,
Plaintiff,

v.

CSX TRANSPORTATION, INC.,
Defendant.

13595 South Dixie Highway
Miami, Florida
September 12, 1989
10:15 A.M.-2:00 P.M.

DEPOSITION OF WILLIAM FOGARTY, PHD

Taken before THOMAS R. NEUMANN, Registered Professional Reporter and Notary Public in and for the State of Florida at Large, pursuant to Notice of Taking Deposition filed in the above cause.

* * *

[50] Q. Did you do anything at all in this case between September 12, '88 and March 8, '89?

A. Nothing that would amount to call my attention to recording that activity. I don't have any recording of any activity. I would have to say no.

Q. What did you do on March 8, '89?

A. I believe I made some calculation relative to train speed. That may have been in May. I'm not certain if

it was in March or May that I did calculation on train speed.

Q. What calculations did you do on train speed, whether it was in March or May?

A. The last sheet I provided to you that has "Speed" written on the top of it—and unfortunately I didn't date the thing—indicating a 549 foot distance from impact to final rest, being given to me hypothetically.

And I then calculated that the probable train speed based upon braking at the time of impact would be in the range of 38 to 45 miles an hour with a probable around 40 or 42 miles an hour.

* * *

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT
ROME DIVISION

Civil Action File No. 4:88-CV-0141-RL

MRS. LIZZIE BEATRICE EASTERWOOD,
Plaintiff,

v.

CSX TRANSPORTATION, INC.,
Defendant.

THE DEPOSITION OF ARCHIE C. BURNHAM, JR.
taken by the Defendant; before Tracy A. Cooper, Certified Court Reporter and Notary Public; commencing at approximately 10:30 a.m., on August 14, 1989 in the offices of Parker and Lundy, Cedartown, Georgia.

Q Now, a railroad company cannot install a traffic control device at a railroad crossing without the DOT's approval; is that right, sir?

A Yes, sir, that's right.

Q And that's even including bells, lights and gates?

A That's correct.

Q Okay.

A And the purpose for that is to assure that the proper standards that are most current are being applied in the design that's being implemented at that spot. So even if you used 100 percent private money, you would still need to coordinate that installation through the Department of Transportation. In fact there's nothing to prohibit that, the use of private money if you have a need that's different than the priority rating that would be determined by the department.

Q If such a situation if a railroad company were to approach DOT to say, "We're going to use private money to install traffic control devices," it still could not be done unless those particular types of devices, plans, or whatever were approved by the DOT?

A That's correct.

* * *

Q What I'm asking is if a railroad company had come to the DOT and said, "We want to put up gates, bells and lights at a crossing other than one that was on the priority list." DOT's policy would be to say, "We want you to do the one, your crossing that's the highest on your priority list."

A Absolutely not. No. The Department would approach that request in accordance with the same design criteria that they would the one that was on the list. But they would, and during my time did, approve installations that were not on the priority list as a request of the railroad.

Q Okay.

A But there were few requests.

Q You are aware are you not, Mr. Burnham, that as you said earlier back in the early '80s or whatever there was discussion about installing gate arms at the Cook Street crossing in Cartersville?

A Yes, sir.

Q And that there was some work done on drawing plans?

A Yes, sir.

Q And that those plans were the original plans that were submitted that the DOT did not approve those plans?

A Are you speaking of the submission of the seven crossings at one time?

Q I'm right now speaking of the submission for the plans of installing gate arms at the Cook Street crossing in the early 1980s?

A I think prior to that is what I'm keying on. In 1980 itself there was a first submission by the railroad asking that a system of seven be incorporated with upgrade. And that agreement was approved at DOT to proceed. As we proceeded with getting estimates back and so forth there were modification that were made that singled out the Cook Street crossing by itself, and continued negotiations to bring that into fruition.

Q Specifically talking about on the Cook Street crossing in 1981 that the DOT specifically said that, no, these plans in whatever form they were for installation of gate arms were not approved because it would impede turning traffic off of that state highway onto Cook Street?

A I think I know what you are referring to, but I don't recall it being in the form of DOT not approving it. I think DOT said that it had to be further modified and found that the modification involved either rechannelization of traffic islands to allow the truck turning movements, or implementation of a different gate arm that involved relocation of some transmission wires through the crossing. And as I recall, it left the status at that point with the request to the railroad to relocate the transmission problems so that the revised gate standard could be continued on.

Q All right. In 1981 do you remember a Mr. Jerry Gossett was a DOT engineer?

A Yes, sir.

Q Do you remember his communicating to you that the plans for gate arms at Cook Street were unacceptable at that time?

A For the reasons that I just mentioned, yes, sir.

Q Do you remember the City of Cartersville expressing saying that the plans were unacceptable because of impeding the turning of the traffic of what have you off of that road?

A That's what I was trying to refer to, yes.

Q At that point in time did the railroad company refuse to do anything to cooperate with the DOT in any fashion?

A Well, I believe what I found out was that the railroad did continue to cooperate in relocating the transmission line that I was speaking of, but that wasn't reported back and uncovered until severe years later when a fatal accident occurred at the crossing.

Q Is there anything that the railroad did that you felt like was either wrong or unacceptable or not cooperating?

A Well, I think it's unfortunate that from the initial exploration and agreement between the railroad and the Department and local government and everybody else that an upgrading was warranted there that so much time elapsed before anything could be done.

Q Are you assigning responsibility of that to the railroad?

A Well, I think that's where the responsibility is all the time, as we just discussed with. And my comments about being unfortunate is that I believe it would be an improved condition to have gates added to that crossing. It's unfortunate that that hadn't occurred yet.

(Whereupon, court reporter marked document referred to as Burnham Exhibit No. 1.)

Q Mr. Burnham, let me show you what we marked Burnham Deposition Exhibit No. 1. Mr. Burnham, the document, the exhibit that we marked as Burnham Exhibit 1, you recognize that as a memo from you to Mr. Brown?

A Yes.

Q And September 24, 1984?

A Yes, sir.

Q And that's a memo where you indicated that, "We have been unable to work out an acceptable design for the railroad crossing location at Cook Street."?

A Yes, sir.

Q Do you remember what prompted that particular memo?

A Yes, sir.

Q Tell me that, please, sir?

A Well, basically because of the sluggishness in the line to clear design problems and other administrative difficulties from the railroad side and be able to move these projects through to completion, we were in danger of losing the money that had been earmarked for this program. And on that date we took a review of which projects were apparently being delayed, identified them and withdrew the money that had been earmarked to pay for those projects and assembled them in a lump sum that could be used on another phase of the program that could be implemented immediately, in this case being the installation of prefabricated crossings.

Q With regard to your statement they had been unable to work out an acceptable design, are you saying that it was because of the railroad or because of any other factors that you were unable to work out an acceptable design?

A The letter doesn't say why it wasn't able to work out a suitable design, but you and I were discussing just before this exhibit that the Jerry Gossett input had indicated that there were some difficulties in either applying the intersection redesign that had been established in the plans, it was not compatible with the City of Cartersville, or solving the problem with a reworking of the crossing on behalf of the railroad. And my recollection is that that resolved itself in a request to the railroad to rework that transmission line so that we could continue on with the bells, lights, gates design, and not force the issue about the intersection traffic islands and the restrictions to the trucks.

Q I'm trying to make sure I understand. Are you saying that—did the railroad not comply with any request that you made in terms of what you had asked them

to do with regard to redesigning the plans or design or what have you?

A No, I think this decision just reflects that it became obvious that it was not going to be something that would be solved immediately, and thus for the temporary problem of addressing the funding situation that the best decision was to put this project in the category with many other projects where the money could be withdrawn and respend and reauthorized at a later time when those problems were solved.

Q What I'm trying to make sure I understand, though is that I want to know what your testimony is as to whether or not at the time there was anything that the railroad either refused to do or didn't do in terms of what the DOT had asked them to do about reworking the designs or plans or whatever to come up with an acceptable plan?

A I think that's obviously that, yes, the railroad had to carry the ball in one particular item or the city would have to carry the ball in another particular item, i.e. the intersection design, and that neither one was moving. And so the Department's decision was to withdraw the money until it could be worked out which way to do it. I subsequently learned that the railroad determined that they would be able to change the transmission line and they subsequently did and then we continued on with the project.

. . . .

EXHIBIT

DEPARTMENT OF TRANSPORTATION
STATE OF GEORGIA

INTERDEPARTMENT CORRESPONDENCE

Office Atlanta, Georgia

Date September 24, 1984

File RRP-000S(206) Bartow County

From Archie C. Burnham, Jr., PE,
State Traffic and Safety EngineerTo Drew A. Brown,
State Transportation Programming Engineer

Subject Railroad Crossing Funds Transfer

We have been unable to work out a suitable design for the railroad crossing located at Couk Street in Cartersville, Bartow County, RRP-000S(206). Therefore, I request that the remaining PE and all construction funds programmed for this crossing be transferred to an active project.

I request that these funds be transferred to cover the cost for installing a pre-fab rubber crossing at the SR 61, (Main Street), multi-track crossing in Cartersville, Bartow County, AAR No. 340441K.

Please take the necessary steps to accomplish this funds transfer. I am attaching location maps and data sheets for these crossings.

If additional information is necessary, please contact Wendell Hester of my staff.

ACB:WAH:to

Attachments

AUG 27 1992

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

CSX TRANSPORTATION, INC.,
v. *Petitioner,*

LIZZIE BEATRICE EASTERWOOD,
Respondent.

LIZZIE BEATRICE EASTERWOOD,
v. *Cross-Petitioner,*

CSX TRANSPORTATION, INC.,
Cross-Respondent.

On Writs of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF FOR PETITIONER IN NO. 91-790
AND CROSS-RESPONDENT IN NO. 91-1206

JACK H. SENTERFITT *
RICHARD T. FULTON
JAMES W. HAGAN
ALSTON & BIRD
1201 West Peachtree
Atlanta, Georgia 30309-3424
(404) 881-7000

HOWARD J. TRIENENS
CARTER G. PHILLIPS
MARK E. HADDAD
LAURA V. FARTHING
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioner in No. 91-790

Counsel for Cross-Respondent in No. 91-1206

August 27, 1992

* Counsel of Record

QUESTIONS PRESENTED

1. Whether a claim under state tort law that the traffic control devices at a railroad crossing were inadequate is pre-empted by the Federal Railroad Safety Act, 45 U.S.C. § 421 *et seq.* (FRSA), because the devices were selected by the state pursuant to mandatory federal standards and could not have been changed by the railroad on its own initiative.

2. Whether a claim under state tort law that a train going between 32 and 45 miles per hour exceeded the maximum reasonable speed is pre-empted under FRSA because the allowable speed of 60 miles per hour is set by regulation adopted by the Secretary of Transportation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION AND STATUTES INVOLVED	2
STATEMENT OF THE CASE.....	3
1. History and Common Law of Grade Crossings....	3
2. Development of Federal Railroad Safety Legislation	5
3. Federal Regulation of Grade Crossings and Train Speed	9
4. Status and Results	12
5. Proceedings and Decisions Below	12
SUMMARY OF ARGUMENT	16
ARGUMENT	20
I. STATE COMMON LAW CLAIMS FOR WRONGFUL DEATH BASED ON ALLEGED NEGLIGENCE IN PROVIDING REASONABLE TRAFFIC CONTROL SIGNALS AT A GRADE CROSSING ARE PRE-EMPTED BOTH EXPRESSLY BY SECTION 434 OF FRSA AND BECAUSE THEY CONFLICT WITH FRSA	22
A. Section 434 Pre-empts Negligence Claims Against Railroads Based On A State Common Law Duty To Select Highway Traffic Control Devices At Grade Crossings Because The Secretary's Regulations And Standards Cover That Subject Matter	23

TABLE OF CONTENTS—Continued

	Page
1. Section 434 Pre-empts State Tort Law	23
2. The Secretary's Rules And Standards Re- lieve Railroads Of Their State Common Law Duty To Select Appropriate Traffic Control Devices For Grade Crossings	28
3. It Is Irrelevant To Pre-emption Under Section 434 Whether The Secretary's Railroad Safety Standards Were Adopted Pursuant To FRSA Or To Some Other Statute	36
4. The Grade Crossing Claim Is Pre-empted Under Any Theory Adopted By Other Federal Courts Of Appeals That Have Applied Section 434	37
B. Enforcement Of A Common Law Duty For Railroads To Select And Install Appropriate Traffic Control Devices Conflicts With FRSA..	40
II. STATE COMMON LAW CLAIMS FOR WRONGFUL DEATH BASED ON ALLEGED NEGLIGENCE IN OPERATING A TRAIN AT AN UNREASONABLY HIGH SPEED ARE ALSO PRE-EMPTED BOTH EXPRESSLY BY SECTION 434 OF FRSA AND BECAUSE THEY CONFLICT WITH FRSA	43
A. The Secretary Has Covered The Subject Matter Of The Appropriate Speed At Which Trains May Travel Through Grade Cross- ings	44
B. Enforcement Of A Common Law Duty For Railroads To Reduce Train Speed At Grade Crossings Also Would Conflict With FRSA..	48
CONCLUSION	50

TABLE OF AUTHORITIES

CASES	Page
<i>Allis-Chalmers Corp. v. Lueck</i> , 471 U.S. 202 (1985)	20
<i>Atlantic Coast Line R.R. v. City of Goldsboro</i> , 232 U.S. 548 (1914)	4
<i>Atlantic Coast R.R. v. Grimes</i> , 109 S.E.2d 890 (Ga. Ct. App. 1959)	43
<i>CSX Transp., Inc. v. City of Thorsby</i> , 741 F. Supp. 889 (M.D. Ala. 1990)	47
<i>CSX Transp., Inc. v. City of Tullahoma</i> , 705 F. Supp. 385 (E.D. Tenn. 1988)	47
<i>CSX Transp., Inc. v. Public Utils. Comm'n</i> , 901 F.2d 497 (6th Cir. 1990), <i>cert. denied</i> , 111 S. Ct. 781 (1991)	37
<i>California Fed. Sav. & Loan Ass'n v. Guerra</i> , 479 U.S. 272 (1987)	40
<i>Capital Cities Cable, Inc. v. Crisp</i> , 467 U.S. 691 (1984)	20
<i>Central of Ga. R.R. v. Markert</i> , 410 S.E.2d 437 (Ga. Ct. App.), <i>cert. denied</i> , 1991 Ga. LEXIS 839 (Ga. S. Ct. Oct. 18, 1991)	28, 43, 47
<i>Chesapeake & Ohio Ry. v. City of Bridgman</i> , 669 F. Supp. 823 (W.D. Mich. 1987)	47
<i>Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.</i> , 450 U.S. 311 (1981)	25
<i>Cipollone v. Liggett Group, Inc.</i> , 112 S. Ct. 2608 (1992)	passim
<i>City of Covington v. Chesapeake & Ohio Ry.</i> , 708 F. Supp. 806 (E.D. Ky. 1989)	47
<i>Continental Improvement Co. v. Stead</i> , 95 U.S. 161 (1877)	4
<i>English v. General Elec. Co.</i> , 496 U.S. 72 (1990)	16, 20, 22
<i>Erie R.R. v. Tompkins</i> , 304 U.S. 64 (1938)	24
<i>FMC Corp. v. Holliday</i> , 111 S. Ct. 403 (1990)	23, 25
<i>Farmers Educ. & Coop. Union v. WDAY, Inc.</i> , 360 U.S. 525 (1959)	18, 25, 42
<i>Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta</i> , 458 U.S. 141 (1982)	25, 26
<i>Florida Lime & Avocado Growers, Inc. v. Paul</i> , 373 U.S. 132 (1963)	45

TABLE OF AUTHORITIES—Continued

	Page
<i>Gade v. National Solid Wastes Management Ass'n</i> , 112 S. Ct. 2374 (1992)	20, 45
<i>Gibbons v. Ogden</i> , 22 U.S. (9 Wheat.) 1 (1824)	20
<i>Grand Trunk Ry. v. Ives</i> , 144 U.S. 408 (1892)	4
<i>Grand Trunk W. R.R. v. Town of Merrillville</i> , 738 F. Supp. 1205 (N.D. Ind. 1989)	47
<i>Hatfield v. Burlington N. R.R.</i> , 958 F.2d 320 (10th Cir. 1992), petition for cert. filed, 60 U.S.L.W. 3860 (U.S. June 8, 1992) (No. 91-1977)	35, 38
<i>Hines v. Davidowitz</i> , 312 U.S. 52 (1941)	40
<i>Illinois Cent. R.R. v. Farris</i> , 259 F.2d 445 (5th Cir. 1958)	4
<i>Illinois v. City of Milwaukee</i> , 406 U.S. 91 (1972)	24
<i>Ingersoll-Rand Co. v. McClendon</i> , 111 S. Ct. 478 (1990)	25
<i>International Paper Co. v. Ouellette</i> , 479 U.S. 481 (1987)	18, 21, 40, 42
<i>Isom v. Schettino</i> , 199 S.E.2d 89 (Ga. Ct. App. 1973)	28
<i>Johnson v. Southern Ry.</i> , 654 F. Supp. 121 (W.D. N.C. 1987)	47
<i>Jones v. Rath Packing Co.</i> , 430 U.S. 519 (1977)	21, 40
<i>Karl v. Burlington N. R.R.</i> , 880 F.2d 68 (1989)	38
<i>Lehigh Valley R.R. v. Board of Pub. Utils. Comm'rs</i> , 278 U.S. 24 (1928)	4
<i>Mahony v. CSX Transp., Inc.</i> , 966 F.2d 644 (11th Cir. 1992)	38
<i>Marshall v. Burlington N., Inc.</i> , 720 F.2d 1149 (9th Cir. 1983)	38, 39
<i>Morales v. Trans World Airlines, Inc.</i> , 112 S. Ct. 2031 (1992)	23, 24, 25
<i>Nashville, C. & St. L. Ry. v. Walters</i> , 294 U.S. 405 (1935)	5
<i>Norfolk & W. Ry. v. American Train Dispatchers Ass'n</i> , 111 S. Ct. 1156 (1991)	16, 24
<i>Perez v. Campbell</i> , 402 U.S. 637 (1971)	45
<i>Pilot Life Ins. Co. v. Dedeaux</i> , 481 U.S. 41 (1987) ..	24

TABLE OF AUTHORITIES—Continued

	Page
<i>San Diego Bldg. Trades Council v. Garmon</i> , 359 U.S. 236 (1959)	27
<i>Santini v. Consolidated Rail Corp.</i> , 505 N.E. 2d 832 (Ind. Ct. App. 1987)	47
<i>Shaw v. Delta Air Lines, Inc.</i> , 463 U.S. 85 (1983) ..	23, 25
<i>Sisk v. National R.R. Passenger Corp.</i> , 647 F. Supp. 861 (D. Kan. 1986)	47
<i>Smith v. Norfolk & W. Ry.</i> , 776 F. Supp. 1335 (N.D. Ind. 1991)	47
<i>Southern Pac. Transp. Co. v. Town of Baldwin</i> , 685 F. Supp. 601 (W.D. La. 1987)	47
<i>Sperry v. Florida</i> , 373 U.S. 379 (1963)	25

CONSTITUTIONAL PROVISION, STATUTES AND
REGULATIONS

U.S. Const. art. VI, cl. 2	2, 20
49 U.S.C.A. §§ 102-104 (1991 Pamphlet)	36
Federal-Aid Highway Act of 1944, ch. 626, 58 Stat. 838 (codified as amended at sections of 23 U.S.C.)	5
23 U.S.C. § 130 note	9
§ 130 (b)	5, 33
§ 130 (c)	5
§ 409	39
Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 85 Stat. 829 (codified at scat- tered Sections of U.S.C.)	
29 U.S.C. § 1144 (a)	24
Federal Highway Act, ch. 241, 39 Stat. 535 (1916) (codified as amended at sections of 23 U.S.C.)	5
Federal Railroad Safety Act, Pub. L. No. 91-548, 84 Stat. 971 (1970) (codified as amended at 45 U.S.C. § 421 <i>et seq.</i>)	6
45 U.S.C. § 421	2, 7
§ 431	2, 7
§ 431 (q)	9
§ 433 (a)	8

TABLE OF AUTHORITIES—Continued

	Page
§ 433 (b)	<i>passim</i>
§ 434	<i>passim</i>
§ 438 (b)	21
Hayden-Cartwright Act, ch. 582, 49 Stat. 1519 (1936) (codified as amended at sections of 23 U.S.C.)	5
Highway Safety Act of 1970, Pub. L. No. 91-605, 84 Stat. 1739 (repealed)	8
Highway Safety Act of 1973, Pub. L. No. 93-87, 87 Stat. 282 (repealed)	9
National Industrial Recovery Act of 1933, ch. 90, 48 Stat. 195 (repealed by Pub. L. No. 89-554, 80 Stat. 648 (1966))	5
Rail Safety Improvement Act of 1988, Pub. L. No. 100-342, 102 Stat. 624 (codified as amended at sections of 23, 45, 49 U.S.C.)	9
Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, 101 Stat. 132 (codified as amended at scattered sec- tions of U.S.C.)	9
Surface Transportation Assistance Act of 1978, Pub. L. No. 95-599, 92 Stat. 2689 (codified as amended at scattered sections of U.S.C.)	9
Ga. Code Ann. § 51-1-2 (1991)	28
23 C.F.R. § 140.900	33
Part 630	9, 17, 28
Part 646	9, 17, 28
§ 646.202	17, 36
§ 646.210	17, 33
§ 646.210 (b) (1)	5, 10, 33, 41
§ 646.210 (b) (2)	5, 33
§ 646.210 (b) (3)	5, 33
§ 646.210 (b) (4)	5
§ 646.214	41
§ 646.214 (b)	19
§ 646.214 (b) (1)	30, 42
§ 646.214 (b) (3)	10, 11, 17
§ 646.214 (b) (3) (i)	11, 34, 46
§ 646.214 (b) (3) (ii)	34

TABLE OF AUTHORITIES—Continued

	Page
§ 646.216 (d) (2) (iv)	33
§ 646.218	33
§ 646.220 (b) (1)	33
Part 655	9, 28, 36
§ 655.601 (a)	31, 40
§ 655.603 (a)	32
§ 655.603 (b) (1)	32
Part 924	9, 10, 17, 28
§ 924.1	29
§ 924.5	10
§ 924.9	40, 41
§ 924.9 (a)	29, 41
§ 924.9 (a) (ii)	39
§ 929.9 (a) (4) (iii)	10, 46
Part 1204	9, 17, 36
§ 1204.4	28, 30
§ 1204.4 No. 12	28, 30
§ 1204.4 No. 13	28, 30, 41
49 C.F.R. § 1.48	36
§ 1.48 (o)	17, 36
§ 1.49	36
Part 201	19
§ 201.4	11, 45
Part 213	11, 19
§ 213.4	44
§ 213.9	44
§ 213.9 (c)	45, 46
§ 213.57	44
§ 213.137	44
§ 215.9	44
Part 218	19
§ 218.37 (a) (1) (i)	44
App. A	11, 44

LEGISLATIVE MATERIALS

116 Cong. Rec. 27612 (1970)	47
116 Cong. Rec. 27613 (1970)	41

TABLE OF AUTHORITIES—Continued

	Page
H.R. Rep. No. 1194, 91st Cong., 2d Sess., <i>reprinted in 1970 USCCAN 4104</i>	7, 18, 41
Hearing on Railroad Safety Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce, Science, and Transportation, 99th Cong., 1st Sess. (1985)	3
Report of the Task Force on Railroad Safety, included as Appendix F to H.R. Rep. No. 1194, 91st Cong., 2d Sess., <i>reprinted in 1970 USCCAN 4104</i>	6
OTHER AUTHORITIES	
W. Keeton, et al., <i>Prosser & Keeton on the Law of Torts</i> (5th ed. 1984)	27
<i>Prevention of Rail-Highway Grade Crossing Accidents Including Railway Trains and Motor Vehicles</i> , 322 I.C.C. 1 (1964)	6
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-790

CSX TRANSPORTATION, INC.,
Petitioner,

v.

LIZZIE BEATRICE EASTERWOOD,
Respondent.

No. 91-1206

LIZZIE BEATRICE EASTERWOOD,
Cross-Petitioner,

v.

CSX TRANSPORTATION, INC.,
Cross-Respondent.

On Writs of Certiorari to the
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BRIEF FOR PETITIONER IN NO. 91-790
AND CROSS-RESPONDENT IN NO. 91-1206

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 933 F.2d 1548. The opinion of the district court (Pet. App. 23a-28a) is reported at 742 F. Supp. 676.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 1991. Rehearing was denied on August 20, 1991. The petition for certiorari was filed on November 15, 1991, the cross-petition was filed on December 16, 1991,

and both were granted on June 29, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The United States Constitution provides in Article VI, Clause 2:

This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land;

Section 101 of the Federal Railroad Safety Act, 45 U.S.C. § 421, provides:

The Congress declares that the purpose of this chapter is to promote safety in all areas of railroad operations and to reduce railroad-related accidents . . .

Section 202 of the Federal Railroad Safety Act, 45 U.S.C. § 431, provides:

The Secretary of Transportation . . . shall prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety . . .

Section 204 (b) of the Federal Railroad Safety Act, 45 U.S.C. § 433 (b), provides:

In addition the Secretary shall, insofar as practicable, under the authority provided by this subchapter and pursuant to his authority over highway, traffic, and motor vehicle safety, and highway construction, undertake a coordinated effort toward the objective of developing and implementing solutions to the grade crossing problem . . .

Section 205 of the Federal Railroad Safety Act, 45 U.S.C. § 434, provides:

The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement . . .

STATEMENT OF THE CASE

Petitioner and cross-respondent CSX Transportation, Inc. (CSXT or petitioner), a wholly owned subsidiary of CSX, is a rail carrier. It operates a rail system comprising approximately 19,000 miles of trackage located in 20 states, the District of Columbia and the Province of Ontario, Canada.

Respondent and cross-petitioner Lizzie Beatrice Easterwood (respondent) is the widow of Thomas Easterwood. On the morning of February 24, 1988, Mr. Easterwood was killed when his truck was struck by a CSXT train at the Cook Street grade crossing in Cartersville, Georgia. Respondent then brought suit against CSXT for wrongful death. The issue before this Court is whether Congress has pre-empted state tort claims when, as here, they are based on allegations of railroad negligence in selecting traffic control devices for grade crossings and in traveling at an unreasonably high speed.

1. History and Common Law of Grade Crossings.

This case arises out of the danger that exists inherently wherever highways and railroads intersect. These crossings are particularly hazardous because, unlike a car, a train traveling at normal speed cannot be stopped within the distance allowed after the operator of the train sees an obstruction on the tracks. The train also cannot swerve to avoid a collision. Finally, use of emergency brakes creates a substantial risk of derailment, which can cause serious injury to passengers and crew and, if the train is carrying hazardous materials, can even harm those in the area of the accident. See U.S. DOT, Rail-Highway Crossings Study 5-10 (1989) ("DOT Study"); U.S. DOT, Railroad-Highway Grade Crossing Handbook 44 (2d ed. 1986) ("DOT Handbook"); Hearing on Railroad Safety Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce, Science, and Transportation, 99th Cong., 1st Sess. 10 (1985) (Statement of John Riley, Administrator of the FRA).

The reason why these potentially dangerous crossings exist and are so numerous is a function of the history of the railroads and highways and the settlement and growth of our nation. The completion of railroads across the country in the middle of the nineteenth century opened the West to growth and development and led to the settling of towns. As the populations within each community grew and the availability of commerce between towns expanded, the need for and use of roads grew. At first, the roads, which accommodated pedestrians and horse-drawn vehicles, were not developed to avoid railroad crossings; instead, they were built right across the tracks. That approach was more convenient and less expensive. It was also more dangerous, and the danger increased as highway and rail traffic increased during the latter half of the nineteenth century. With the advent of the automobile in the early part of this century, the danger became acute. See DOT Study 1-4 to 1-5; DOT Handbook 1-4, 15.

The initial response of the common law was to impose primary responsibility on the railroads for ensuring safety at grade crossings. See *Continental Improvement Co. v. Stead*, 95 U.S. 161 (1877). The railroads bore the duty in the operation of trains and in the maintenance of highway crossings to exercise reasonable care to avoid injury to persons crossing or traveling along the railroad. *Grand Trunk Ry. v. Ives*, 144 U.S. 408, 416-20 (1892); *Illinois Cent. R.R. v. Farris*, 259 F.2d 445, 447-48 (5th Cir. 1958). A railroad also could be required to bear a portion of the costs of any public improvements made to further safety. *Lehigh Valley R.R. v. Board of Pub. Utils. Comm'rs*, 278 U.S. 24, 34-35 (1928); *Atlantic Coast Line R.R. v. City of Goldsboro*, 232 U.S. 548, 559-60 (1914). Travelers injured as a consequence of the railroads' negligence in carrying out these duties could seek damages through common law tort suits.

With the development and increasing use of automobiles and other motor vehicles, however, it became clear that railroads were not uniquely or even well suited to

protect highway travelers. While train traffic remained relatively constant, the speed and volume of highway traffic increased dramatically. It was the highway traffic, over which the railroad had no control, that made crossings more dangerous. This Court observed that "[t]he railroad has ceased to be the prime instrument of danger and the main cause of accidents. It is the railroad which now requires protection from dangers incident to motor transportation." *Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405, 422-23 (1935).

2. Development of Federal Railroad Safety Legislation.

a. Over time, states and eventually the federal government responded to the increased danger at grade crossings with a more comprehensive response than railroads alone could provide. Recognizing that the primary answer lay in controlling traffic moving onto the tracks, Congress initially addressed the grade crossing problem through federal highway legislation.¹ In 1944, Congress provided the states with federal funds designated "for the elimination of hazards of railway-highway crossings." Federal-Aid Highway Act of 1944, ch. 626, 58 Stat. 838 (codified as amended at 23 U.S.C. § 130(a)). To allocate the cost of such projects Congress required the Secretary to determine "the net benefit to the railroad" of any projects to improve the safety of grade crossings, and to charge the railroad for its share of the cost of the project, "in no case [to] exceed 10 per centum." 23 U.S.C. § 130(b), (c).²

¹ Congress first provided states with general purpose highway funds that could be and were used to fund grade crossing improvements in the Federal Highway Act (ch. 241, 39 Stat. 535 (1916)). The National Industrial Recovery Act of 1933 (ch. 90, 48 Stat. 195) and Hayden-Cartwright Act (§ 8, ch. 582, 49 Stat. 1519 (1936)) were the first two federal laws in which Congress specifically earmarked federal funds for improving grade crossing safety. See generally DOT Study at 1-7; DOT Handbook at 8-9.

² The Secretary subsequently concluded that the net benefit of grade crossing improvement to the railroads was zero. 23 C.F.R. § 646.210(b)(1)-(4). See *infra*, pp. 33-34.

Despite "continuing efforts to improve" safety, accidents at grade crossings "increased rather sharply" between 1960-67. DOT Study 1-5. Realizing that merely providing federal funds to supplement state and private efforts had not succeeded in reducing grade-crossing accidents, the Secretary of Transportation called on representatives of the railroad industry, railroad labor organizations and state regulatory commissions to form a task force in 1969 to analyze the problem and recommend solutions. See Report of the Task Force on Railroad Safety ("Task Force Report"), included as Appendix F to H.R. Rep. No. 1194, 91st Cong., 2d Sess., reprinted in 1970 USCCAN 4104, 4125 ("House Report"). At the same time, "grade-crossing accidents rank[ed] as the major cause of fatalities in railroad operations." *Id.* at 4126. These accidents were of particular "public concern" because of "[t]he need for transporting ever-increasing quantities and varieties of hazardous materials." *Id.* at 4127. The Task Force concluded that "[r]ailroad safety is wide in scope and requires a more comprehensive national approach." *Id.* It recommended that the "Secretary of Transportation" be given the "authority to promulgate reasonable and necessary rules and regulations establishing safety standards in all areas of railroad safety," and that "[e]xisting State rail safety statutes and regulations remain in force until and unless preempted by Federal regulation." *Id.* at 4129, 4130.³

b. Congress responded by enacting the Federal Railroad Safety Act of 1970 (FRSA), 45 U.S.C. § 421 *et seq.* The first section of FRSA declares that Congress's purpose is "to promote safety in all areas of railroad opera-

³ See also *Prevention of Rail-Highway Grade Crossing Accidents Including Railway Trains and Motor Vehicles*, 322 I.C.C. 1, 82 (1964) (concluding, after extensive hearings, that "[i]n the past it was the railroad's responsibility for protection of the public at grade crossings. This responsibility has now shifted. Now it is the highway, not the railroad, and the motor vehicle, not the train which creates the hazard and must be primarily responsible for its removal").

tions and to reduce railroad-related accidents, and to reduce deaths and injuries to persons and to reduce damage to property caused by accidents involving any carrier of hazardous materials." 45 U.S.C. § 421. To achieve that end, as the Task Force had recommended, Congress vested authority in "[t]he Secretary of Transportation . . . [to] prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety." *Id.* at § 431. In order to achieve the national uniformity essential to make the Secretary's regulatory efforts effective, Congress also provided that all state law addressing a particular aspect of rail safety would be pre-empted once the Secretary had adopted a rule or standard covering that subject matter. Employing sweeping pre-emptive language, Congress declared:

that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement.

Id. at § 434.⁴ In taking this action, Congress made clear its view that safety would not be promoted "by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems." House Report at 4109.

Although FRSA provided the Secretary with authority to regulate all areas of rail safety, Congress emphasized the importance of having the Secretary promptly and specifically review the safety of railroad grade crossings. Congress required the Secretary to prepare and submit

⁴ Congress did allow the states to "adopt or continue in force an additional or more stringent law, [etc.]" that is "necessary to eliminate or reduce an essentially local safety hazard," so long as the state rule is not incompatible with federal law and does not otherwise "creat[e] an undue burden on interstate commerce." 45 U.S.C. § 434. See *infra*, p. 47, n.21.

within one year of the enactment of FRSA "a comprehensive study of the problem of eliminating and protecting railroad grade crossings . . . together with his recommendations for appropriate action." 45 U.S.C. § 433(a). Congress also directed the Secretary to use all available statutory authority, including but not limited to the authority provided by FRSA, to address the grade crossing problem:

In addition the Secretary shall, insofar as practicable, under the authority provided by this subchapter and pursuant to his authority over highway, traffic, and motor vehicle safety, and highway construction, undertake a coordinated effort toward the objective of developing and implementing solutions to the grade crossing problem

Id. at 433(b).⁵

In response, the Secretary submitted a comprehensive two-part report on the history, scope, causes of, and potential solutions to the problem of railroad-highway safety. U.S. DOT, Report to Congress: Railroad-Highway Safety, Part 1: A Comprehensive Statement of the Problem (1971), Part II: Recommendations for Resolving the Problem (1972) ("DOT Report"). In this report, the Secretary noted that grade crossings were "the only location along the highway where the highway authorities do not have total responsibility for and control over the installation, operation and maintenance of traffic control devices." DOT Report Part II at 33. The Secretary accordingly recommended "national coordination" of the currently "fragmented approach" to safety problems at grade crossings. DOT Report Part I at iii, Part II at 34.

Congress responded to the Secretary's Report with additional legislation designed to facilitate the Secretary's

⁵ Several months later, Congress enacted the Highway Safety Act of 1970, Pub. L. No. 91-605, 84 Stat. 1739, which also required the Secretary to "conduct a full and complete investigation and study" of rail-highway crossing safety. *Id.* at 205 (formerly codified at 23 U.S.C. § 322(e)).

ability to address railway-highway safety. In the Highway Safety Act of 1973, Pub. L. No. 93-87, 87 Stat. 282, Congress initiated special funding for a program to eliminate hazards at railroad-highway crossings. *Id.* at Section 203 (codified as amended at 23 U.S.C. § 130). Congress required each State to "conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose." *Id.* at 203(a). Each state was required to report annually to the Secretary on the costs and the effect on accidents of its rail-highway crossings program. *Id.* at 203(e).⁶

3. Federal Regulation of Grade Crossings and Train Speed.

a. Pursuant to this legislation, and after careful study, the Secretary has comprehensively regulated the role of traffic control devices in ensuring public safety at grade crossings. See generally 23 C.F.R. Parts 630, 646, 655, 924, 1204.4. Having determined that it would be impracticable for the Secretary directly to select the appropriate traffic control devices at each of the more

⁶ Since 1973, Congress has continued to strengthen federal support for improving crossing safety. For example, in 1978 Congress passed the Surface Transportation Assistance Act of 1978, Pub. L. No. 95-599, 92 Stat. 2689, which appropriated over \$500 million to state transportation agencies to install automatic traffic control devices, (§ 203(a)), and expanded the program to include all crossings on "any public road." § 203(b). The more recent Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, 101 Stat. 132, repealed the Federal Highway Safety Act of 1973, but replaced it with substantially similar language and mandated an updated study of grade crossing safety. See Pub. L. No. 100-17, 101 Stat. 132, 159, § 121 (codified at 23 U.S.C. § 130); 23 U.S.C. § 130 note.

In 1988, Congress amended FRSA to require the Secretary to promulgate "such rules, regulations, orders, and standards as may be necessary to ensure the safe maintenance, inspection, and testing of signal systems and devices at railroad highway grade crossings. 45 U.S.C. § 431(q), added by the Rail Safety Improvement Act of 1988, Pub. L. No. 100-342, § 23, 102 Stat. 624, 639.

than 170,000 public grade crossings nationwide, the Secretary developed a nationally coordinated "Grade Crossing Program" that involves state and local transportation authorities. The Secretary's regulations require each state to "develop and implement . . . a highway safety improvement . . . program" that "shall incorporate . . . a process for establishing priorities for implementing highway safety improvement, considering . . . the relative hazard of public railroad-highway grade crossings based on a hazard index formula." 23 C.F.R. §§ 924.5, 924.9(a)(4)(iii). To assist States in the task of surveying crossings and setting priorities, the Secretary, working with states and railroads, developed a national inventory of all grade crossings. See DOT Study 1-19. The Secretary then developed a Hazard Index Formula for states to use in ranking the danger posed by each crossing. DOT Handbook 63-79. Each state is then required to "develop appropriate countermeasures" for the hazards at its "railroad grade crossings." 23 C.F.R. § 1204.4 No. 13.D.5.

The Secretary's efforts have eliminated much of the age-old problem of overlapping and conflicting responsibility for grade-crossing protection. The Secretary's mandated Highway Safety Improvement Program (23 C.F.R. Part 924) and associated regulations make clear that the responsibility for "[t]he determination of need and selection of devices at a grade crossing" lies squarely with local and state authorities. U.S. DOT, Manual for Uniform Traffic Control Devices 8A-1 (1988) ("MUTCD") (adopted as law at 23 C.F.R. §§ 646.214(b)(1), 655.601, 655.603(a)); see also MUTCD at 8D-1 ("selection of . . . devices . . . is determined by the public agencies having jurisdiction[]"). The Secretary has further required state approval for any proposed traffic control device (MUTCD 8D-1), and has foreclosed the assessment of any portion of the cost of selecting and installing new traffic control devices against the railroad. 23 C.F.R. § 646.210(b)(1).

Furthermore, the Secretary has even regulated the narrow subissue of when an automatic gate with flashing signals is required. In 23 C.F.R. § 646.214(b)(3), the

Secretary has identified six "conditions" which mandate the use of a warning gate unless a "diagnostic team" justifies a departure from the regulations. *Id.*

b. The Secretary also has comprehensively regulated the subject of train speeds. The regulations set forth a maximum allowable operating speed for each of six categories of track. 49 C.F.R. §§ 201.4, 213 & App. A. The maximum speeds are designed to minimize the possibility that the train will derail and to promote efficient rail service with due regard for grade crossing safety.

The Secretary has specifically addressed the impact on public safety of the speed of a train at a grade crossing. Although the issues of train speed and grade crossing protections come to the Court separately as legal questions, they are integrally related safety issues, and the Secretary has treated them as such. Under the Secretary's regulations, train speed is a significant consideration in deciding what type of traffic control devices should be installed at a grade crossing. 23 C.F.R. § 646.214(b)(3)(i). For example, "where trains operate at speeds of 20 mph or higher," the Secretary requires that "circuits controlling automatic flashing light signals shall provide for a minimum operation of 20 seconds before arrival of any train on such track." MUTCD 8C-7.

These regulations reflect the Secretary's realization that the best way to improve safety at grade crossings is not to attempt to tailor train speeds. As discussed above, even at relatively slow speeds, trains can neither stop in time nor swerve to avoid a collision. The Secretary has therefore restricted train speeds to prudent maximums given the need to protect against the safety problem of derailment, and then regulated the nature of traffic control devices to ensure that highway traffic will receive adequate warning of the train's approach at any speed within the overall limits. The Secretary's comprehensive standards thus regulate both train speed and highway crossing devices in a manner designed to

ensure that every highway-railroad crossing is reasonably safe.

4. Status and Results.

As of 1990, there were 176,572 public grade crossings, which constitute slightly more than half of all grade crossings. U.S. DOT, Rail-Highway Crossing Accident/Incident and Inventory Bulletin No. 13—Calendar Year 1990, at 45 (July 1991) (“DOT Crossing Inventory”). Fifteen percent of these crossings had an automatic gate, and an additional 21 percent had another type of active warning device (flashing lights and/or other special devices). *Id.* at 51. Most of the remaining public crossings (59 percent) had a cross-buck or other “passive” warning sign. *Id.* See generally DOT Study 4, 2-6.

The Secretary’s integrated approach to improving grade crossing safety has been extraordinarily effective. Since the start of the Rail-Highway Crossings program in 1974, the federal government has spent more than \$2.4 billion to support over 26,000 projects to improve safety at grade crossings. Report of the Secretary of Transportation to the United States Congress, The 1992 Annual Report on Highway Safety Improvement Programs, at S-2 (April 1992) (“1992 Annual Report”). These projects, together with the Secretary’s regulations, have reduced the rate of fatal injuries at grade crossings by 88 percent since 1974. *Id.*; see also *id.* at IV-5. Non-fatal injuries have been reduced by 60 percent. *Id.* By contrast, “[i]n the 9 years between 1958 and 1967 the casualty ratio remained almost constant.” DOT Report Part I at 16. Accordingly, the Secretary has estimated that “the program has prevented over 6,800 fatalities and 28,500 nonfatal injuries since 1974.” 1992 Annual Report at S-2, IV-5.

5. Proceedings and Decisions Below.

On June 3, 1988, respondent filed a diversity action against CSXT for wrongful death in the United States District Court for the Northern District of Georgia. Respondent alleged that CSXT negligently failed to install

an automatic gate at the crossing and that GSXT’s train crew had operated the train at an unreasonably high speed.⁷ It is undisputed that the active warning devices at the Cook Street crossing included two flashing lights suspended on a pole on the shoulder of Cook Street, two additional flashing lights suspended directly over the street by a cantilevered boom, and two more lights placed on a separate signal mast; the passive warnings included two railroad crossbuck signs, an advance railroad warning sign, and a large “RxR” pavement marking.

After discovery, CSXT moved for summary judgment on the ground that these tort claims were pre-empted by Section 434 of FRSA, 45 U.S.C. § 434. In support of its motion, CSXT submitted several affidavits. One was from a motorist who stated that she was directly behind Mr. Easterwood, saw the warning lights, heard the bells and the train approaching, and watched Mr. Easterwood’s truck drive through the lights and onto the track. J.A. 12-14.

Another was from Wendall A. Hester, Manager of the Railroad-Highway Grade Crossing Section of the Georgia Department of Transportation (“GDOT”). *Id.* at 15-17. Pursuant to Georgia’s federally mandated State Highway Improvement Program, Mr. Hester’s Section had the responsibility for “inspection and evaluation of grade-crossings on a state-wide basis, and [for] the preparation of Diagnostic and Engineering Inspection Reports for each crossing inspected.” *Id.* at 16.

In his affidavit, Mr. Hester explained that the Cook Street crossing was one of five grade crossings in Cartersville that his Section reviewed in the late 1970’s and

⁷ Respondent made several other allegations of negligence, none of which is before this Court at this time and some of which should be available to respondent on remand. See Pet. 3; Cross-Pet. 11. The persistence of some common law claims reflects the narrow scope of the pre-emption ruling that petitioner seeks. See *infra* pp. 21-22.

early 1980's. *Id.* The Section initially planned to install a new "combination flashing light and gate assembly" at the West Avenue grade crossing. *Id.* Because the train-detection circuitry needed for that new device was incompatible with the circuitry in place at the four nearby crossings, including Cook Street, the Section decided to "upgrade the flashing light signals and circuitry at these crossings" as well. *Id.* By December, 1981, the "new circuitry and the combination flashing light gate assembly" were installed at all but the Cook Street crossing. *Id.* State and federal funds paid for the installation. *Id.*

"Plans for upgrading the crossing signals at Cook Street were drawn up at the same time" as for the other crossings. *Id.* at 16-17. But Cook Street is wider than the streets at the other crossings and "because of the large crossing width, gates could not be designed to cover the crossing without constructing a traffic island in the street." *Id.* at 17. Construction of a traffic island, in turn, required City approval because Cook Street is a city street. *Id.* The Section submitted its proposal to the City of Cartersville, which "rejected the plan as being too restrictive to the large volume of trucks using the crossing." *Id.* As a result, at Cook Street only the circuitry for the "motion detector" was upgraded "to insure frequency compatibility with the automatic detection devices installed at the adjacent West Avenue crossing." *Id.*

After oral argument, the district court granted CSXT's motion for summary judgment. Applying FRSA's express pre-emption provision, the district court held that respondent's claim of negligence "in failing to install gate arms" is pre-empted. *Pet. App.* at 26a. The court found that the GDOT had evaluated the Cook Street crossing, had initially determined that gate arms "should be installed," but later "transferred the funds to other projects and removed the Cook Street crossing from the list

of crossings to receive gate arms." *Id.* Because the GDOT had acted "pursuant to federally delegated authority" in determining the appropriate traffic control devices for Cook Street, the court held that any common law duty on the railroad to duplicate that review was pre-empted. *Id.*

The district court also held that "the pervasive nature of federal regulation" of train speed pre-empted respondent's negligence claim on that ground. *Id.* at 25a-26a. The court specifically found that "[t]he track in question is classified [by the Secretary] as class four track and, according to federal regulations, the maximum train speed for class four track is 60 miles per hour." *Id.* at 25a. The court then found that "there is no evidence that the train exceeded this federal standard,"⁸ and thus no basis for any state law negligence claim "based on the train's speed." *Id.* at 26a.

The court of appeals affirmed the district court's ruling with respect to train speed. *Id.* at 7a-9a. On the question of responsibility for selecting appropriate traffic control devices, however, the court of appeals reversed. The court held that the Secretary's regulations governing railroad-highway grade crossings did not trigger pre-emption under Section 434 of FRSA because they were "not promulgated . . . under his general power to regulate railroad safety." *Id.* at 10a. In the alternative, the court ruled that even if Section 434 were applicable, the decision of the GDOT not to follow through on the initial recommendation to install a gate constituted "a policymaker's failure to act [that] is insufficient to constitute pre-emption." *Id.* at 12a (distinguishing *Marshall v. Burlington N., Inc.*, 720 F.2d 1149 (9th Cir. 1983)). Finally, the court declined to infer pre-emption from federal highway legislation alone. *Id.* at 11a.

⁸ The engineer testified that the train was traveling at 32 m.p.h. J.A. 21-22; respondent's expert estimated train speed at between 38 and 45 m.p.h. *Id.* at 26-27.

SUMMARY OF ARGUMENT

Under well-established standards for pre-emption under the Supremacy Clause, state law is invalid if it relates to a subject matter that Congress has reserved exclusively for federal regulation or if state law and federal law conflict because state law stands as an obstacle to the achievement of Congress's objectives. *English v. General Elec. Co.*, 496 U.S. 72, 78-79 (1990). Respondent's tort claims are barred by principles of both express statutory pre-emption and conflict pre-emption.

I.

In enacting FRSA, Congress sought to make the law "relating to railroad safety . . . nationally uniform to the extent practicable." 45 U.S.C. § 434. To that end, Congress ordered the Secretary of Transportation to use his authority over both railroad and highway safety to promulgate national standards to improve rail safety, and in particular to "implemen[t] solutions to the grade crossing problem." 45 U.S.C. § 433(b). Congress then expressly provided that state law must give way as soon as the Secretary adopts "a rule, regulation, order or standard covering the subject matter of such State requirement." 45 U.S.C. § 434. Because Section 434 broadly pre-empts "any law . . . relating to railroad safety" whose subject matter is covered by any federal standard, the statute expressly pre-empts duties imposed under state common law. *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2620 (1992) (plurality op.); *Norfolk & W. Ry. v. American Train Dispatchers Ass'n*, 111 S. Ct. 1156, 1163-64 (1991).

Respondent's first claim is that CSXT negligently failed to select an appropriate traffic control device—an automatic gate—for the Cook Street crossing. This claim, if allowed to stand, would impose upon CSXT a state law duty to evaluate, select, install, and pay for appropriate traffic control devices at grade crossings. That duty is pre-empted under the plain language of Section

434 by the Secretary's promulgation of comprehensive regulations and standards that cover this subject matter.

A.

The federal government now administers, funds, and supervises a prospective-looking regulatory scheme that places responsibility upon state and local transportation authorities, and not upon railroads, to evaluate safety at grade-crossings, to set priorities for improvements, and to select and pay for the installation of appropriate traffic-control devices. 23 C.F.R. Parts 630, 646, 924, 1204.4. The Secretary declares that "[t]he determination of need and selection of devices at a grade crossing is made *by the public agency* with jurisdictional authority," and that no device may be installed without state approval. MUTCD 8A-1, 8D-1 (emphasis added). Moreover, public agencies must provide "an automatic gate" at any public crossing that meets one or more of the criteria set forth by the Secretary. 23 C.F.R. § 646.214(b)(3). States, which receive substantial federal funding for grade-crossing improvements, may not assess any of these costs to railroads. *Id.* at § 646.210.

This comprehensive regulatory scheme "covers the subject matter" of evaluating the need for, selecting, and paying for traffic control devices at grade crossings by assigning that duty to public authorities. The common law duty that respondent seeks to enforce not only relates to the subject matter of these regulations—it would assign to railroads the very same duties that federal law assigns to public agencies. It is therefore pre-empted by the plain terms of Section 434.

The court of appeals' contrary conclusion is both factually and legally erroneous. The Secretary's grade-crossing regulations were adopted pursuant to his authority under FRSA as well as under federal highway legislation. 49 C.F.R. § 1.48(o); 23 C.F.R. § 646.202. Furthermore, pre-emption under Section 434 is triggered by any regulation

adopted by the Secretary, no matter what the source of his authority. 45 U.S.C. §§ 433(b), 434.

B.

Even apart from Section 434, respondent's negligence claim is pre-empted under the basic standards of conflict pre-emption. The duty respondent seeks to impose upon the railroads is precisely the same duty that the Secretary has placed on public authorities. "The inevitable result" of perpetuating this common law duty "would be that . . . States could do indirectly what they could not do directly"—require railroads to pay for improvements in traffic control devices. *International Paper Co. v. Ouellette*, 479 U.S. 481, 495 (1987). At bottom, allowing imposition of this state law duty frustrates Congress's express goal of replacing the prior system of retrospective, *ad hoc* "enforcement by 50 different judicial and administrative systems" (House Report at 4109) with a nationally coordinated, uniform approach that carefully directs limited resources toward the highest priority crossings.

This case graphically illustrates the conflict. The decision not to install a gate was made by the City of Cartersville to promote *highway* safety and convenience. For that reason the State Department of Transportation chose to protect that crossing by upgrading the signals, and not by installing a gate. Once the State chose the proper devices to protect both highway and rail safety, CSXT had no responsibility to install a gate at that crossing and, indeed, could not have done so on its own initiative. Judicial imposition of a common law duty to take action where federal law imposes a regulatory bar is the archetypal situation where state law is pre-empted. See *Farmers Educ. & Coop. Union v. WDAY, Inc.*, 360 U.S. 525 (1959).

II.

Respondent's second claim, which is intertwined with the first claim concerning the need for a crossing gate, is that CSXT's engineers negligently operated the train at

an excessive speed in traveling through the Cook Street crossing. It is undisputed that petitioner's train was traveling well within expressly stated federal speed limits. The question, therefore, is whether respondent may seek to enforce a common law duty to travel through grade crossings at what a jury, years later, declares to be the "reasonable" speed that is slower than the federal maximum.

A.

The Secretary has expressly covered the subject matter of what train speeds are proper at grade crossings. The Secretary's regulations comprehensively address all aspects of train speed. 49 C.F.R. Parts 201, 213, 218. The Secretary has decided what speeds are appropriate on all tracks and set the limit at Cook Street at 60 miles per hour. In dealing with train speeds and grade crossings as an integrated subject, the Secretary has chosen to address the particular problem of train speed at grade crossings by regulating the nature, timing and placement of traffic control devices to ensure that motorists are given adequate warning of the train's approach at any speed within the maximum set by federal law. 23 C.F.R. § 646.214(b); MUTCD 8C-5. A common law duty to travel at a slower, "reasonable" speed unquestionably relates to the subject matter regulated by the Secretary and therefore is pre-empted under Section 434.

B.

Respondent's claim also conflicts with the achievement of Congress's purposes in enacting FRSA. The Secretary's regulations reflect the judgment that keeping highway traffic off the tracks through effective warning signals is the best way to prevent collisions. Because of the inherent differences between motor vehicles and trains, slower train speeds are at best ineffective in improving grade-crossing safety and indeed can increase the risk of accidents. Respondent's attempt through state law to prevent accidents by reducing speeds conflicts with the federal system and therefore is pre-empted.

ARGUMENT

Under the Supremacy Clause, U.S. Const., art. VI, cl. 2, state laws that “interfere with, or are contrary to, the laws of congress, made in pursuance of the constitution” are invalid. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 92 (1824). The basic standards of this doctrine of “pre-emption” are well settled and have been repeated frequently by this Court. *English*, 496 U.S. at 78-79. The ultimate inquiry is whether Congress intended federal law to exclude the operation of state law. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985) (“the question whether a certain state action is pre-empted by federal law is one of congressional intent”). Congress’s intent can be ascertained most directly in statutory provisions, such as Section 434 of the FRSA, that describe expressly when state regulation is pre-empted. In interpreting such provisions, the Court considers “‘the explicit statutory language and the structure and purpose of the statute.’” *Gade v. National Solid Wastes Management Ass’n*, 112 S. Ct. 2374, 2382 (1992) (quoting *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478, 482 (1990)).

Absent an explicit pre-emption provision, the Court will determine whether “Congress has intended, by legislating comprehensively, to occupy an entire field of regulation and has thereby ‘left no room for the States to supplement’ federal law.” *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699 (1984) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Where, as here, there is an explicit pre-emption provision, however, “‘there is no need to infer congressional intent to pre-empt state laws from the substantive provisions’ of the legislation.” *Cipollone*, 112 S. Ct. at 2618 (plurality opinion) (quoting *California Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 282 (1987) (opinion of Marshall, J.)). As Justice Scalia explained in his separate opinion in *Cipollone*, “[t]he existence of an express pre-emption provision tends to contradict any inference that Congress intended to occupy a field broader than the statute’s ex-

press language defines.” *Id.* at 2633 (Scalia, J., concurring in part and dissenting in part).

Finally, “[i]n addition to express or implied pre-emption, a state law also is invalid to the extent that it ‘actually conflicts with a . . . federal statute.’” *International Paper Co.*, 479 U.S. at 491 (citation omitted). A conflict requiring pre-emption occurs whenever it is impossible for a private party to comply with both state and federal requirements, or where state law “‘stands as an obstacle to the accomplishment and execution of the full purposes or objectives of Congress.’” *Jones v. Rath Packing Co.*, 430 U.S. 519, 525-26 (1977) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

In this case, respondent’s assertions that petitioner should have provided different traffic control devices and that travel at 30-45 miles per hour was excessive are pre-empted both by Section 434 and because they conflict with FRSA. Petitioner’s pre-emption argument is very narrow. Petitioner does not seek complete immunity from tort law; it seeks merely to prevent state tort law from imposing liability upon a railroad (1) for a decision (regarding traffic control devices) that is assigned to state officials by federal law and from which petitioner is not free to depart and (2) for conduct (regarding train speed) that falls well within the limits for safety mandated by the Secretary of Transportation.

Accordingly, petitioner remains responsible at common law to pay compensatory damages for injuries caused by its failure properly to operate or maintain traffic control devices, a responsibility that the Secretary has left with the railroad. Similarly, petitioner could be liable for compensatory damages if one of its trains exceeded the federally imposed speed limit and thereby caused an injury.⁹ But liability for the decision of state and local

⁹ FRSA sets forth a schedule of civil penalties for violations of the regulations. 45 U.S.C. § 438(b). These fines, which are paid to

officials to choose a particular traffic control device or for operating within the speed limit set by the Secretary is pre-empted both under the plain meaning of Section 434 of FRSA and in light of Congress's purpose in enacting FRSA.

I. STATE COMMON LAW CLAIMS FOR WRONGFUL DEATH BASED ON ALLEGED NEGLIGENCE IN PROVIDING REASONABLE TRAFFIC CONTROL SIGNALS AT A GRADE CROSSING ARE PRE-EMPTED BOTH EXPRESSLY BY SECTION 434 OF FRSA AND BECAUSE THEY CONFLICT WITH FRSA.

Congress has expressly stated its intent, in Section 434 of FRSA, to pre-empt "any law . . . relating to" railroad safety once the Secretary has adopted a rule "covering the subject matter of such state requirement." 45 U.S.C. § 434. The Secretary has adopted regulations and standards that cover the subject matter of evaluating, selecting, and paying for traffic control devices at railroad-highway grade crossings. Accordingly, any state law, including common law, that imposes a duty upon railroads that relates to this subject matter is expressly pre-empted by Section 434.

Respondent's warning-device claim is pre-empted for a second reason. Enforcement of such a common law duty would conflict with Congress's express purpose in FRSA and the Federal Highway Safety Act to replace the patchwork scheme of varying federal, state, and private responsibility with a uniform federal scheme that effectively promotes safety at grade crossings.

the U.S. Treasury, are plainly punitive in nature and do not address the subject matter of compensating a party injured by the violation of the regulation. They therefore do not cover the subject matter of a claim for compensatory damages at common law. See also *English v. General Elec. Co.*, 496 U.S. 72, 87 (1990) (federal enforcement scheme "does not by itself imply pre-emption of state remedies").

A. Section 434 Pre-empts Negligence Claims Against Railroads Based On A State Common Law Duty To Select Highway Traffic Control Devices At Grade Crossings Because The Secretary's Regulations And Standards Cover That Subject Matter.

1. Section 434 Pre-empts State Tort Law.

In determining whether Section 434 pre-empts state tort law relating to railroad safety, the Court "begin[s] with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *FMC Corp. v. Holliday*, 111 S. Ct. 403, 407 (1990) (quoting *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985)); see also *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2036 (1992) (same).¹⁰

a. Here, the "breadth of [Section 434's] pre-emptive reach is apparent from [its] language." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 (1983). Section 434 pre-empts "any law . . . relating to railroad safety." 45 U.S.C. § 434. On its face, this broad language encompasses state common law that would impose a duty on railroads to select appropriate traffic control devices for grade crossings.

¹⁰ There is some question as to whether and how the principle that pre-emption is not presumed applies where Congress, through an express pre-emption provision, has clearly manifested an intention to pre-empt state law. Compare *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2621 (1992) ("fairly" construing statute to pre-empt some tort actions but "narrowly" construing statute to determine precisely which ones) with *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2036 (1992) (state airline advertising laws were pre-empted by an express pre-emption provision based on the "ordinary meaning of th[e] language" of the federal law); *FMC Corp. v. Holliday*, 111 S. Ct. 403, 407 (1990). In this case, a crabbed interpretation of the term "any law" in § 434 would be inconsistent with both the sweeping language of the provision and with its dominant purpose, which is to ensure national uniformity of railway safety standards so far as practicable.

When confronted with comparable, or even somewhat narrower, language in other statutes, this Court has consistently interpreted such language to refer both to common law as well as to statutory law. At issue in *Norfolk & W. Ry. v. American Train Dispatchers Ass'n*, 111 S. Ct. 1156 (1991), for example, was a provision of the Interstate Commerce Act that exempted carriers from "the antitrust laws and from all other law, including State and municipal law." *Id.* at 1159 (quoting 49 U.S.C. § 11341(a)). The Court held that the provision encompassed state common law because the phrase "'all other law' indicates no limitation," and because the context indicated that the term was to be given a broad reading. *Id.* at 1163-64. Similarly, in construing the express pre-emption provision of the Employee Retirement Income Security Act, 29 U.S.C. § 1144(a), the Court held that the language "any and all State laws . . . [that] relate to any employee benefit plan" extends to state common law. *Pilot Life Ins. Co. v. Dedcaux*, 481 U.S. 41, 45 (1987).

Most recently, in *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992), the Court held that the statutory phrase "'requirement or prohibition' [imposed under state law] . . . easily encompass[es] obligations that take the form of common law rules." *Id.* at 2620 (plurality opinion); *id.* at 2634 (Scalia, J., joined by Thomas, J., concurring in part and dissenting in part). The plurality opinion recognized that "[a]t least since *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), we have recognized the phrase 'state law' to include common law as well as statutes and regulations." 112 S. Ct. at 2620. See *Erie*, 304 U.S. at 71 (law includes "the unwritten law of the State as declared by its highest court"); *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972) ("[w]e see no reason not to give 'laws' its natural meaning . . . , and therefore conclude that . . . [it includes] claims founded upon . . . common law as well as those of statutory origin"); *cf. Morales*, 112 S. Ct. at 2037-38 (rejecting argument that statutory phrase "any law . . . relating to" does not

encompass state laws of "general applicability"). Where Congress has chosen to pre-empt "any law," therefore, it should be understood to have pre-empted common law as well as statutes.¹¹

b. The Court "must give effect to this plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning." *Shaw*, 463 U.S. at 97. Neither the language nor the structure and purpose of the Act provide any basis for departing from the plain meaning of Section 434.

The language of Section 434 is sweeping in all respects—far more so, for example, than the cigarette advertising statute at issue in *Cipollone*. In Section 434, for the express purpose of achieving national uniformity, Congress chose to pre-empt "any law . . . relating to" railroad safety. The phrase "any law" is surely as broad, if not broader, than "state law." And the phrase "relating to," as this Court has repeatedly held, is "conspicuous for its breadth." *FMC Corp.*, 111 S. Ct. at 407. As the Court stated just last Term, "the words thus express a broad pre-emptive purpose." *Morales*, 112 S. Ct. at 2037. In sum, Section 434 applies to any law that "has a connection with or reference to" railroad safety. *Shaw*, 463 U.S. at 97.

¹¹ This Court has repeatedly pre-empted common law claims where necessary to ensure proper operation of a uniform federal scheme. See, e.g., *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478, 484 (1990) (uniform federal scheme of regulation pre-empts common law because "[i]t is foreseeable that state courts, exercising their common law powers, might develop different substantive standards applicable to the same . . . conduct"); *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 326 (1981) ("A system under which each State could, through its courts, impose . . . its own version of reasonable service requirements could hardly be more at odds with the uniformity contemplated by Congress"); *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 154-59 (1982); *Sperry v. Florida*, 373 U.S. 379, 403 (1963); *Farmers Educ. & Coop. Union v. WDAY, Inc.*, 360 U.S. 525, 535 (1959).

Nor does the balance of the statute indicate any grounds for a narrowing construction. A straightforward reading is mandated by the opening sentence of Section 434, in which "Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform *to the extent practicable*." 45 U.S.C. § 434 (emphasis added). There is nothing "impracticable" about construing Section 434 to pre-empt common law duties that overlap with national duties imposed by the Secretary. To achieve uniformity, Section 434 must be so interpreted.¹²

Moreover, the statute's careful recitation that it pre-empts "any law, rule, regulation, order, or standard" once the Secretary has adopted a "rule, regulation, order, or standard" underscores Congress's intent to pre-empt every type of state-imposed standard. Congress required only that the Secretary, by any means within the Secretary's power, provide a standard covering "the subject matter of such State requirement." *Id.* See also *id.* at § 433(b) (instructing the Secretary to use all of his authority, both under "this subchapter and pursuant to" the highway safety laws, to improve safety at grade crossings).¹³

¹² As discussed *supra*, pp. 21-22, petitioner does not take the position that FRSA pre-empts all common law claims arising out of injuries at grade crossings. FRSA is identical, in this respect, to the Federal Cigarette Labeling and Advertising Act addressed in *Cipollone*. In both statutes, Congress did not expressly refer to "common law" in either a pre-emption or a savings clause because "Congress was neither pre-empting nor saving common law as a whole—it was simply pre-empting particular common law claims, while saving others." 112 S. Ct. at 2621 n.22.

¹³ In an ordinary case of delegated rulemaking authority, the issuing agency's intent is essential to a pre-emption analysis. See *Fidelity Fed. Sav. & Loan Ass'n*, 458 U.S. at 154 (even absent express pre-emption provision, federal agency may pre-empt state law as long as its regulation unequivocally expresses its pre-emptive intent and is within the agency's rulemaking authority).

In this case, Section 434 itself pre-empts all state law that is "covered" by a regulation or standard. The plain language of Section 434 makes the Secretary's pre-emptive intent redundant. The

The concluding term of Section 434, "such State requirement," also reinforces the same conclusion. The term is most naturally read as a shorthand reference to the longer phrase "law, rule, regulation, order, or standard" that precedes it in the sentence. As this Court recognized in *Cipollone*, "common law damages actions are premised on the existence of a legal duty and it is difficult to say that such actions do not impose 'requirements or prohibitions.'" 112 S. Ct. at 2620.¹⁴ Thus, a tort always involves "a violation of some duty owing to plaintiff." *Id.* at 2622 n.23 (quoting Black's Law Dictionary 1489 (6th ed. 1990)). For this reason, "[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 246-47 (1959). Common law duties therefore must be pre-empted if Section 434 is to achieve national uniformity in standards "to the extent practicable." The remaining question, therefore, is whether the Secretary, through a "rule, regulation, order, or standard," has "covered the subject matter" of the common law duties at issue here.

point is noteworthy because the Solicitor General, in his brief supporting certiorari in this case, stated categorically that "[i]f a lawfully promulgated agency regulation is at issue, that regulation's pre-emptive scope is similarly determined by the intent of the issuing authority." U.S. Br. 15. That statement needs qualification here. Because the Secretary clearly has broad rulemaking authority over railroad safety, he could pre-empt state law without Section 434. A requirement with respect to the Secretary's intent would render the intent of Congress embodied in Section 434 essentially superfluous. In any event, the only reasonable conclusion to draw from the Secretary's comprehensive regulatory scheme is that the Secretary intended to pre-empt tort law duties such as respondent asserts here.

¹⁴ See also W. Keeton, et al., *Prosser & Keeton on the Law of Torts* 22 (5th ed. 1984) (tort law establishes "the conduct required of the actor by society for the protection of others"); Restatement (Second) of Torts § 4 (1965) (duty imposed under common law "denote[s] the fact that the actor is required to conduct himself in a particular manner at the risk that if he does not do so he becomes subject to liability").

2. The Secretary's Rules And Standards Relieve Railroads Of Their State Common Law Duty To Select Appropriate Traffic Control Devices For Grade Crossings.

The "subject matter" of the common law rule that respondent seeks to enforce is the railroad's duty to provide reasonable warning devices (here, an automatic gate) at grade crossings. Pet. App. 24a. Under Georgia common law, CSXT would be required to "exercise reasonable or ordinary care, commensurate with the danger of the particular situation" at the Cook Street grade crossing. *Central of Ga. R.R. v. Markert*, 410 S.E.2d 437, 439 (Ga. Ct. App.) (quoting 74 C.J.S., Railroads, § 713, at 1308), cert. denied, 1991 Ga. LEXIS 839 (Ga. S. Ct. Oct. 18, 1991). The jury would decide whether additional signals or devices should have been installed in the exercise of ordinary care. *Isom v. Schettino*, 199 S.E.2d 89, 93 (Ga. Ct. App. 1973); see also Ga. Code Ann. § 51-1-2 (1991) (ordinary care is "that degree of care which is exercised by ordinarily prudent persons under the same or similar circumstances").

The essence of the common law system is its retrospective focus; railroads typically would identify the need for new warnings only after the accident occurred. The Secretary has replaced that system—at least insofar as the selection of appropriate traffic control devices is concerned—with a comprehensive prospective approach. See generally 23 C.F.R. Parts 630, 646, 655, 924, 1204.4 & Nos. 13, 13. In particular, the Secretary has adopted standards and regulations that (a) assign to local and state authorities the duty to evaluate crossings and select appropriate warning devices; (b) provide that railroads shall not be ordered to bear any part of the cost of installing those devices; and (c) explicitly identify the circumstances in which gates should be installed as additional protection at a particular grade crossing. These regulatory actions effectively cover the subject matter of responsibility for determining when automatic gates or other

traffic control devices are needed and therefore pre-empt the assignment through state tort law of a comparable duty to railroads.

a. The Secretary has delegated to the Federal Highway Administrator authority to promulgate regulations implementing the Secretary's responsibilities for ensuring grade crossing safety under FRSA and the Federal Highway Safety Act. See *infra* p. 36 & n.15. Chapter I of Title 23 of the Code of Federal Regulations contains the FHWA's regulations. Two subchapters contain regulations that assign responsibility for selecting appropriate traffic control devices to public authorities.

(i). Subchapter J is entitled "Highway Safety." In Part 924, entitled "Highway Safety Improvement Program," the Secretary requires each state to develop and implement "a comprehensive highway safety improvement program." 23 C.F.R. § 924.1. The program must have a "planning component" that "shall incorporate:

(1) A process for collecting and maintaining a record of accident, traffic, and highway data . . . ,

...

(3) A process for conducting engineering studies of hazardous locations . . . ,

(4) A process for establishing priorities for implementing highway safety improvement projects, considering:

(i) The potential reduction in the number and/or severity of accidents,

(ii) The cost of the projects and the resources available,

(iii) The relative hazard of public railroad-highway grade crossings based on a hazard index formula,

(iv) Onsite inspection of public grade crossings,

(v) The potential danger to large numbers of people at public grade crossings used on a regular basis by passenger trains, school buses, transit buses, pedestrians, bicyclists, or by trains and/or motor vehicles carrying hazardous materials"

Id. at 924.9(a). To assist the states in setting priorities for improvements based on the information collected, the Secretary has developed both a Hazard Index Formula and detailed cost-benefit models designed to account for all of the many variables that go into a determination whether additional warning signals are needed. See DOT Handbook at 178-81; U.S. DOT, Rail-Highway Crossing Resource Allocation Procedure, User's Guide (3d ed. 1987).

The Secretary also has issued "Uniform Guidelines for State Highway Safety Programs." 23 C.F.R. Part 1204.4. These guidelines establish that state programs "should provide, as a minimum, . . . a systematic identification and tabulation of all rail-highway grade crossings and a program for the elimination of hazards and dangerous crossings," and should include a schedule to "[a]nalyze potentially hazardous locations, such as . . . railroad grade crossings and develop appropriate countermeasures." 23 C.F.R. § 1204.4 Nos. 12.I.G. and 13.D.5 (emphasis added).

(ii). The Secretary has further regulated the responsibility for selecting traffic control devices at grade crossings in subchapter G, "Engineering and Traffic Devices." Subsection 646.214(b) is entitled "Grade Crossing Improvements." It states, in pertinent part, that "[a]ll traffic control devices proposed shall comply with the latest edition of the Manual on Uniform Traffic Control Devices for Streets and Highways [MUTCD] supplemented to the extent applicable by State standards." 23 C.F.R. § 646.214(b)(1). The MUTCD, in turn, expressly assigns responsibility for selecting devices at grade crossings to local authorities, subject to state approval. Part VIII of the MUTCD, which is entitled "Traffic control systems for railroad-highway grade crossings," states:

With due regard for safety and for the integrity of operations by highway and railroad users, the highway agency and the railroad company are entitled to jointly occupy the right-of-way in the conduct of their assigned duties. This requires joint responsi-

bility in the traffic control function between the public agency and the railroad. *The determination of need and selection of devices at a grade crossing is made by the public agency with jurisdictional authority.* Subject to such determination and selection, the design, installation and operation shall be in accordance with the national standards contained herein.

MUTCD at 8A-1 (emphasis added); see also *id.* at 8D-1 ("The selection of traffic control devices at a grade crossing is *determined by public agencies* having jurisdictional responsibility at specific locations") (emphasis added). Part VIII further specifies that the decision regarding which particular traffic control device is appropriate for a particular crossing is one that requires an "engineering and traffic investigation," and that no device may be installed until approval is received from the state:

Due to the large number of significant variables which must be considered there is no single standard system of active traffic control devices universally applicable for grade crossings. Based on an engineering and traffic investigation, a determination is made *whether any* active traffic control system is required at a crossing and, if so, what type is appropriate. Before a new or modified grade crossing traffic control system is installed, *approval is required from the appropriate agency* within a given state.

Id. (emphasis added).

This assignment of responsibility to public authorities, and not private parties, is a "rule, regulation, order or standard" adopted by the Secretary. The Secretary has expressly "incorporated by reference" the MUTCD into the Code of Federal Regulations. See 23 C.F.R. § 655.601(a). The Secretary has further stated that the MUTCD "is the national standard for all traffic control devices installed on any street [or] highway" and that it "is specifically approved by the FHWA [Federal Highway Administration] for application on any highway project in which Federal-highway funds participate." *Id.* at

§ 655.603(a). Finally, the Secretary has "delegated" to the FHWA Regional Administrator "the authority to approve state MUTCDs and supplements," which "shall be in substantial conformance with the national MUTCD." *Id.* § 655.603(b)(1). These regulations leave no doubt that the Secretary has both covered the subject matter of responsibility for selecting traffic control devices at grade crossings and ensured that that regulation will be nationally and uniformly applied.

(iii). The Secretary's regulations thus assign to state and local transportation authorities, and not to railroads, the task of setting priorities for improvements at all public railroad grade crossings and selecting appropriate traffic control devices. The regulations implement the judgment that the choice of warning signals is a matter of public policy that must take into account factors, such as the use of crossings by local school or transit buses, that public authorities are uniquely well-suited to know about and monitor. For example, if a new school were being built that would require a number of buses to cross the railroad tracks two times each day, then the local jurisdictions would know that the crossing would need to be re-evaluated to determine whether additional traffic control protection was required. Conversely, while a railroad might be inclined to urge improvements in warning devices after a train accident involving a truck moving materials from a local manufacturer, a local jurisdiction would know if the company were planning to relocate, and thus if resources would be better spent upgrading a different crossing.

Thus, the Secretary's regulations and standards cover the subject matter of selecting appropriate grade crossing devices. It is inconceivable that the Secretary, having required states to engage in a comprehensive evaluation of all railroad grade crossings, would expect railroads to duplicate that effort in order to meet common law obligations. The railroads are not in as good a position as a centralized federal agency, let alone local and state authorities, to conduct a crossing-by-crossing survey, ex-

amine local conditions, and make public policy choices about appropriate levels of warning devices.

b. The Secretary's assignment of responsibility to public authorities for the selection of appropriate safety improvements at grade crossings is underscored by the Secretary's regulations concerning the allocation of costs for selecting and installing (as opposed to operating and maintaining) traffic control devices. These regulations appear in Part 646 of Title 23, subpart B, which is entitled "Railroad-Highway Projects." There, the Secretary has issued detailed regulations implementing Congress's directive to classify a percentage of the costs (not to exceed 10 per centum) "of projects involved in the elimination of hazards of railway-highway crossings" to be paid by the railroad as a reflection of "the net benefit to the railroad" of the project. 23 U.S.C. § 130(b). See 23 C.F.R. § 646.210; see also *id.* at 646.216(d)(2)(iv); 646.218; 646.220(b)(1); *cf.* 23 C.F.R. § 140.900.

In general, the Secretary has determined that "[p]rojects for grade crossing improvements are deemed to be of no ascertainable net benefit to the railroads and there shall be no required railroad share of the costs." 23 C.F.R. § 646.210(b)(1); see also *id.* at § 646.210(b)(2); § 646.216(d)(2)(iv). The only exceptions are where "the railroad has a specific contractual obligation with the State" to share in the costs of reconstructing an existing grade separation (*id.*), or where the project involves "the elimination of existing grade crossings at which active warning devices are in place or *ordered to be installed by a State regulatory agency.*" *Id.* at 646.210(b)(3) (emphasis added).

These regulations also effectively eliminate the railroads' former duty to select appropriate warning devices. By covering the subject matter of which parties should pay for the installation of improved warning devices at grade crossings, and by determining that states may not order railroads to pay, the Secretary has effectively preempted any state law that would place a duty on railroads to pay for such improvements. Indeed, the finding

that improvements at grade crossings have "no ascertainable net benefit" to railroads completely undermines any argument that they have a continuing duty to make such improvements. If that common law duty remained, then the use of federal money to satisfy that obligation would directly and significantly benefit the railroads.

c. Because the claim in this case is that a railroad should have installed a gate at the crossing in question, yet another of the Secretary's regulations is directly relevant. As discussed above, subsection 646.214(b) initially establishes that all traffic control devices must comply with the MUTCD. The MUTCD sets forth the design standards that all devices must meet, but does not indicate when automatic gates are required at a particular grade crossing. That question is specifically covered in subsection 646.214(b)(3). Entitled "Adequate warning devices," this subsection provides that "the installation of the devices are to include automatic gates with flashing light signals when one or more of the following conditions exist." 23 C.F.R. § 646.214(b)(3)(i). Examples of relevant conditions include "a combination of high speeds and moderately high volumes of highway and railroad traffic, . . . substantial numbers of school buses, . . . trucks carrying hazardous materials," or when "[a] diagnostic team recommends them." *Id.* at 646.214(b)(3)(i)(D), (E), (F). The regulation further provides that "[the] FHWA may find that the above requirements are not applicable" where "a diagnostic team justifies that gates are not appropriate." *Id.* at 646.214(b)(3)(ii).

Nothing could demonstrate more concretely that the Secretary has "covered the subject matter" of a particular state law than this regulation. By identifying the conditions that require the installation of a warning gate, the Secretary has covered the subject matter that might otherwise be addressed through state tort law by imposing a duty to install a gate at a particular crossing when "ordinary care" so required.

d. The issue of who has the duty to evaluate crossings and select and pay for traffic control devices is

starkly presented by the facts of this case. Respondent's primary argument below was that petitioner had the duty of care, and that an automatic gate should have been installed at Cook Street because such a gate allegedly would have prevented Mr. Easterwood from traveling onto the tracks at the time the CSXT train arrived.

CSXT, however, never made the decision not to install a gate. As envisioned by the Secretary's regulations, it was the State of Georgia, pursuant to its federally mandated Highway Safety Improvement Program, that examined the Cook Street crossing and that initially proposed that a gate be installed. It was not CSXT that objected to this proposal. City officials refused to approve the upgrade because it required construction of a traffic island that the City believed would create a traffic hazard, particularly for trucks, given the nearby highway intersection. Lacking city approval, state officials, pursuant to their federal authority, decided to keep the flashing lights in place and upgrade only the train-detection circuitry. See *supra* pp. 13-14.

While petitioner could have objected to state officials about the decision made by the City, CSXT had no authority to do anything other than comply with the State's decision to defer to the City and focus on other grade crossings within the state. See MUTCD 8D-1 (requiring state approval before installation of any warning device); *Hatfield v. Burlington N. R.R.*, 958 F.2d 320, 323 (10th Cir.), *petition for cert. filed*, 60 U.S.L.W. 3860 (U.S. June 8, 1992) (No. 91-1977) (holding that MUTCD "effectively prohibits a railroad from acting on its own to select and install a safety device"). Under these circumstances, federal law plainly covers the subject matter to which state common law relates, namely, the imposition of a duty to select and install a gate at the Cook Street crossing in Cartersville.

3. It Is Irrelevant To Pre-emption Under Section 434 Whether The Secretary's Railroad Safety Standards Were Adopted Pursuant To FRSA Or To Some Other Statute.

The court of appeals did not quarrel with any of the principles outlined above concerning Section 434. Instead, the court of appeals held that Section 434 of FRSA is inapplicable to state law relating to grade crossings because the Secretary's regulations and standards covering grade crossings were promulgated pursuant to the Secretary's authority over highway safety rather than over rail safety. Pet. App. 10a-11a.

The court's analysis is flawed both factually and legally. Factually, the Secretary's standards are based as much on FRSA as on any other source of regulatory authority. Parts 646, 655, and 1204.4 were promulgated by the Secretary through the Federal Highway Administration pursuant to *both* federal highway legislation *and* Section 204 of FRSA (45 U.S.C. § 433(b)).¹⁵ See 23 C.F.R. § 646.2§2 (Statement of Authority referencing 49 C.F.R. § 1.48), Part 655 (same), and Part 1204.4 (same). Under Section 1.48, the Secretary delegated to the FHWA the authority to administer numerous sections of Title 23 and to "[e]xercise the authority vested in the Secretary by section 204(b) of the Federal Railroad Safety Act of 1970 (84 Stat. 972, 45 U.S.C. § 433(b)) with respect to the laws administered by the [FHWA] pertaining to highway safety and highway construction." 49 C.F.R. § 1.48(o) (emphasis added).

The Secretary's express acknowledgement that he was acting pursuant to FRSA, though noteworthy, is ultimately unnecessary as a legal matter given the plain language of Section 434. Section 434 does not limit its pre-emptive scope to regulations adopted by the Secretary

¹⁵ The Secretary heads the Department of Transportation, which comprises several agencies, including the FRA and the FHWA. See 49 U.S.C.A. §§ 102-104 (1991 Pamphlet). The Secretary has delegated various authority to both agencies. See generally 49 C.F.R. §§ 1.48 and 1.49.

pursuant to FRSA. The statute allows state law relating to railroad safety to be enforced only "until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement." 45 U.S.C. § 434. Section 434 thus pre-empts state law upon the Secretary's adoption of a rule without any limitation on the source of the Secretary's authority as long as it involves railroad safety. See *CSX Transp., Inc. v. Public Utils. Comm'n*, 901 F.2d 497, 501 (6th Cir. 1990) ("FRSA pre-emption relates to *all* rules and regulations regarding railroad safety promulgated by the Secretary, whether or not such regulations are promulgated by the [FRA]") (emphasis in original), *cert. denied*, 111 S. Ct. 781 (1991).

The Eleventh Circuit's analysis also is inconsistent with the immediately preceding section of FRSA. There, Congress authorized the Secretary to use his authority not only under FRSA but also under the highway acts to develop and implement solutions to the grade crossing problem. Specifically, Congress stated that "the Secretary shall, insofar as practicable, under the authority provided by this subchapter *and pursuant to his authority over highway, traffic, and motor vehicle safety, and highway construction*, undertake a coordinated effort toward the objective of developing and implementing solutions to the grade crossing problem." 45 U.S.C. § 433(b) (emphasis added). The plain language of Sections 433(b) and 434, not discussed by the court of appeals, demonstrate that the court's formalistic distinction between regulations promulgated pursuant to highway versus railroad authority is untenable.

4. The Grade Crossing Claim Is Pre-Empted Under Any Theory Adopted By Other Federal Courts Of Appeals That Have Applied Section 434.

Under the plain language of section 434, the Secretary's decisions to require States to select appropriate warning devices through their Highway Safety Improvement Programs, and to adopt the MUTCD as a national standard,

pre-empted any common law obligation on the part of railroads to continue to assume that responsibility. This is the unambiguous holding of the most recent appellate court outside the Eleventh Circuit to have interpreted Section 434. See *Hatfield*, 958 F.2d at 342.¹⁶

Another appellate court, however, has suggested that pre-emption of state law does not occur until the local agency has actually made a judgment "on the adequacy of the warning devices at [a particular] crossing." *Marshall v. Burlington N., Inc.*, 720 F.2d 1149, 1154 (9th Cir. 1983) (Kennedy, J.). In the Ninth Circuit's view, the Secretary cannot be said to have "covered" the "subject matter" of traffic control devices at a grade crossing until a local authority has specifically ruled on that crossing.

The Ninth Circuit's approach to the meaning of "subject matter" is unduly narrow. There is no evidence that Congress ever intended the Secretary directly to select warning devices for each of the nation's public crossings. Rather, Congress directed the Secretary to coordinate a uniform regulatory scheme. When the Secretary assigned to state and local jurisdictions the responsibility for selecting appropriate warning devices, he plainly regulated the "subject matter" of responsibility for such selection as surely as the common law did when it imposed the same responsibility upon railroads. *Hatfield*, 958 F.2d at 324.

The Ninth Circuit's interpretation is also inconsistent with Congress's decision to exclude much of the evidence regarding local decisionmaking in damages actions. See

¹⁶ In *Mahony v. CSX Transp., Inc.*, 966 F.2d 644 (11th Cir. 1992), an Eleventh Circuit panel held that it was bound by *Easterwood* to reverse a district court's finding that FRSA pre-empted a common law claim for railroad negligence in selecting warning devices at grade crossings. The other courts of appeals to have addressed comparable tort claims are the Eighth Circuit in *Karl v. Burlington N. R.R.*, 880 F.2d 68, 75-76 (1989), which did not even discuss express pre-emption under Section 434, and the Eleventh Circuit in this case and in *Mahony*. See also Pet. 16 (citing lower court cases finding warning-device claim pre-empted).

23 U.S.C. § 409 (federal and state courts may not admit into evidence any "reports, surveys, schedules, lists, or data compiled for the purpose of identifying, evaluating, or planning the safety enhancement of . . . railway-highway crossings . . . in any action for damages"). Pre-emption under Section 434 should not be made to turn on evidence that Congress has deemed inadmissible. More broadly, the Ninth Circuit's approach undermines the goal of national uniformity and effectiveness that Congress expressly set forth in Section 434. The Ninth Circuit's approach effectively requires railroads to duplicate the states' efforts in evaluating grade crossings, thereby squandering scarce resources that Congress intended to deploy in a coordinated and productive way. And by holding out the possibility of independent railroad action, the Ninth Circuit's approach creates a disincentive for states and local authorities to act promptly to survey grade crossings and order improvements where warranted.

In this case, however, the undisputed record shows that respondent's claim is pre-empted even under the Ninth Circuit's test. In *Marshall*, the court refused to find pre-emption because local authorities had yet to decide if additional warning devices were necessary. 720 F.2d at 1154. Here, by contrast, the court of appeals assumed that local authorities had assessed the need for additional warning devices, had decided that they were needed, but had failed to implement the decision "due to various financial constraints and logistical problems." Pet. App. 12a. See also *supra*, pp. 13-14. Although the panel characterized this action by the state as "a failure . . . to act" (Pet. App. 12a), it is clear that the Georgia DOT made precisely the kind of priority-based determination whether or not to add additional warnings to this grade crossing that is mandated by the federal regulatory scheme. *E.g.*, 23 C.F.R. § 924.9(a)(ii) (requiring consideration of "cost of the projects and the resources available"). In these circumstances, even under the Ninth Circuit's test, a common law claim against the railroad is pre-empted.

B. Enforcement Of A Common Law Duty For Railroads To Select And Install Appropriate Traffic Control Devices Conflicts With FRSA.

Imposing on railroads a duty to select and install appropriate warning signals at grade crossings also conflicts with the federal approach that Congress mandated in FRSA and that the Secretary's regulations have implemented.¹⁷ Under the Federal statutes and the Secretary's implementation of that program, it is the public authority that is responsible for selecting the appropriate traffic control devices, subject to the approval of the appropriate state agency. 23 C.F.R. § 655.601(a), 924.9; MUTCD 8A-1, 8D-1. That responsibility cannot also be placed upon the railroad without frustrating the achievement of the "full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

¹⁷ Petitioner does not interpret the plurality opinion in *Cipollone* to establish a new rule that the existence of an express pre-emption provision in a particular statute precludes all inquiry into conflicts pre-emption. See *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2618 (1992) (plurality opinion) ("the pre-emptive scope of the [statute] is governed entirely by the express language" of that provision); see also *id.* at 2625 (Blackmun, J., joined by Kennedy and Souter, J.J., concurring in part and dissenting in part). Rather, the plurality opinion held only that an inquiry into implied field pre-emption is inappropriate. See 112 S. Ct. at 2618 (express pre-emption provision means "'there is no need to infer congressional intent to pre-empt state laws from the substantive provisions' of the legislation") (citation omitted).

This interpretation is appropriate for two reasons. First, any broader reading would conflict with *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977), where this Court squarely held that a state law not pre-empted under an express pre-emption provision was nevertheless invalid because it stood "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 540-41 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1942)); see also *International Paper Co. v. Ouellette*, 479 U.S. 781 (1987). Second, the plurality opinion relied (112 S. Ct. at 2618) on *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 282 (1987) (opinion of Marshall, J.), which considered whether a state law conflicted with a federal statute that had an express pre-emption provision.

Congress left no doubt that its objective in enacting FRSA was to replace the fragmented approach toward responsibility for grade-crossing safety with a nationally coordinated, uniform approach. *E.g.*, 45 U.S.C. §§ 433(b), 434; House Report at 4109 ("The committee does not believe that safety in the Nation's railroads would be advanced sufficiently by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems"); 116 Cong. Rec. 27613 (1970) (Statement of Rep. Pickle) (FRSA will "eliminat[e] the possibility of patchwork regulations and substitut[e] instead a clear-cut national program"). The Secretary's regulations implement that goal, in significant measure, by assigning to public authorities the responsibility for evaluating grade crossings and selecting appropriate warning devices, and by setting out in detail the factors those public authorities should consider in setting priorities and in deciding when particular warning devices are needed. See 23 C.F.R. §§ 646.214, 924.9, 1204.4 No. 13.D.

This assignment of responsibility is appropriate given the many elements, most of which include information available to local authorities and not to railroads, that go into the "engineering and traffic investigation" necessary to set priorities and select proper traffic control signals. MUTCD 8D-1. For each crossing, the decisionmaker must consider, among other things, the volume of traffic at the crossing, whether school buses or trucks carrying hazardous materials use the crossing, and what impact a change in signals will have on highway traffic.¹⁸ 23 C.F.R. § 924.9(a). Local authorities should make these judgments, both because they are in the best position to

¹⁸ More signs and warnings do not necessarily increase safety at every grade crossing. As the Secretary explained in his comprehensive 1971-72 Reports to Congress, stopping highway traffic unnecessarily "increases the danger for other vehicles using the highway and has resulted in vehicle-vehicle collisions when such vehicles are decelerating to stop, are stopped, and also when such vehicles attempt to re-enter the traffic stream." DOT Report Part I at 75; see MUTCD at 8B-7, 8D-1.

gather and be alert to the relevant information, and because the final decision may involve trade-offs that a public body, considering public safety, is uniquely suited to make.

Imposing the duty to make these decisions simultaneously on public authorities and on railroads creates significant conflicts and undermines the achievement of a uniform, nationally coordinated scheme of highway-rail safety. For example, in the Secretary's scheme, states are expressly prohibited from assessing to railroads any portion of the cost of installing improved warning devices at a railroad crossing. *Id.* at § 646.210(b)(1). Yet, under the common law, states can force railroads either to select and pay for improvements in warning devices or to pay the penalty of compensatory damages to parties who are injured at the crossing. "The inevitable result" of allowing states to impose such an obligation on railroads is to permit states to "do indirectly what they could not do directly"—force railroads to pay for the cost of installing new traffic control devices at grade crossings. *International Paper Co. v. Ouellette*, 479 U.S. 481, 495 (1987). Here, as in *Ouellette*, common law must be pre-empted to avoid such a conflict.

Similarly, in the Secretary's scheme, railroads are prohibited from installing a traffic control device without first obtaining the approval of the state. MUTCD 8D-1; 23 C.F.R. § 646.214(b)(1). Yet, under the common law, a jury, not the state highway authority, determines whether "the danger" posed at a crossing requires installation of additional warning devices and holds railroads accountable for a decision that—by operation of federal law—was not the railroad's to make. Such conflicting obligations are intolerable under the Supremacy Clause. *Farmers Educ. & Coop. Union v. WDAY, Inc.*, 360 U.S. 525 (1959) (common law libel claim pre-empted where federal law prohibited broadcaster from deleting libelous statements from political advertisements).

This case aptly illustrates these conflicts. Here, City authorities refused to accept the State's initial recommendation to install a gate because they feared an adverse impact on highway traffic. See *supra* pp. 13-14. This weighing of the competing benefits and burdens of adding additional traffic controls is precisely the judgment that the Secretary has directed public authorities to make. To subject CSXT to a negligence action for failing to pay to install a warning device that (a) the state could not directly require CSXT to pay for, and (b) CSXT is barred from installing on its own initiative, conflicts with the uniform, nationally coordinated approach to crossing safety that Congress intended to achieve.

II. STATE COMMON LAW CLAIMS FOR WRONGFUL DEATH BASED ON ALLEGED NEGLIGENCE IN OPERATING A TRAIN AT AN UNREASONABLY HIGH SPEED ARE ALSO PRE-EMPTED BOTH EXPRESSLY BY SECTION 434 OF FRSA AND BECAUSE THEY CONFLICT WITH FRSA.

Respondent bases her claim for wrongful death on a second theory, that petitioner violated its common law duty to operate its train at a "moderate and safe rate of speed" when traveling through the Cook Street grade crossing. *Central of Ga. R.R. v. Markert*, 410 S.E.2d 437, 438 (Ga. Ct. App.) (citing *Gay v. Sylvania Cent. R.R.*, 53 S.E.2d 713, 717 (Ga. Ct. App. 1949)), *cert. denied*, 1991 Ga. LEXIS 839 (Ga. S. Ct. Oct. 18, 1991); see also *Atlantic Coast R.R. v. Grimes*, 109 S.E.2d 890, 893 (Ga. Ct. App. 1959) (railroad "must exercise ordinary care" in controlling train speed at crossings within city limits). Section 434 pre-empts this claim as well. Although the issue is presented separately, it is inextricably related to the basic issue of grade crossing safety. For that reason, the Secretary not only has adopted comprehensive train speed regulations that pre-empt this claim, but also has specifically covered the subject matter of the hazard to motorists posed by train speed at grade crossings. Even apart from Section 434, failure to pre-empt common law

duties with regard to train speed would frustrate Congress's and the Secretary's objectives to achieve a uniform effective, and efficient system of rail transportation as well as to ensure crossing safety.

A. The Secretary Has Covered The Subject Matter Of The Appropriate Speed At Which Trains May Travel Through Grade Crossings.

The court of appeals correctly held that the Secretary's regulations had covered the subject matter of the speed at which trains may travel, including the appropriate speed for grade crossings. Pet. App. 7a-9a. As the court of appeals observed, the Secretary has set forth comprehensive regulations that classify track into six categories and set "maximum operating speeds" for every class of track. 49 C.F.R. § 213.9 and App. A. Because the track at this grade crossing is class 4, the maximum allowable operating speed for a freight train is 60 mph. *Id.*

In setting its speed regulations, the Secretary plainly took into account safety concerns. One such concern was to minimize the possibility of derailments, one of the leading causes of train accidents prior to 1970. Task Force Report at 4126. But the Secretary's speed regulations address additional safety concerns as well. For example, the Secretary has addressed the safety hazard that is posed when a train travels too slowly along a given stretch of track. "When a train is moving on the main track at less than one-half the maximum authorized speed," a crew member must alert following trains to the danger "by dropping off single lighted fusees at intervals that do not exceed the burning time of the fusee." 49 C.F.R. § 218.37(a)(1)(i). The Secretary has imposed particular limits and controls for moving defective cars for repair (§ 215.9), for certain segments of "excepted track" (§ 213.4), for curves (§ 213.57), and for segments of damaged track (§ 213.137). Petitions to exceed the maximum allowable operating speed may be submitted to the Federal Railroad Administrator, and must provide information on such issues as "the performance charac-

teristics of the track, signaling, and grade crossing protection." *Id.* at § 213.9(c); see also *id.* at § 201.4 (promising "the just, speedy, and inexpensive determination of all issues raised with respect to any proposal to increase speeds").

Even assuming, as the court of appeals did, that this is all that the Secretary had promulgated with regard to train speed, such regulation would be sufficient, without more, to pre-empt state duties concerning train speed. Pet. App. 7a-9a. As this Court held this past Term, pre-emption "turns not on whether federal and state laws 'are aimed at distinct and different evils'" but on whether they "'operate upon the same object.'" *Gade v. National Solid Wastes Management Ass'n*, 112 S. Ct. 2374, 2387 (1992) (citation omitted); see, e.g., *Perez v. Campbell*, 402 U.S. 637, 651-52 (1971); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963) (same).

But the Secretary's regulations do in fact address the precise issue of the hazard posed by train speed at grade crossings that would otherwise be the subject of a common law duty. Rather than minimize the need for grade crossing protection by lowering train speeds, the Secretary has sought to adjust grade crossing warnings to ensure adequate protection for the speed at which the trains will be traveling. As a general matter, for all grade crossings, the Secretary has specifically required that active warning signals be adjusted to give no less than 20 seconds of warning regardless of the speed of the train:

On tracks where trains operate at speeds of 20 mph or higher, circuits controlling automatic flashing light signals shall provide for a minimum operation of 20 seconds before arrival of any train on such track.

Where the speeds of different trains on a given track vary considerably under normal operation, special devices or circuits should be installed to provide reasonably uniform notice in advance of all train movements over the crossing.

MUTCD 8C-7. At the same time, the Secretary has recognized that "care must also be taken to ensure that the warning time is not excessive," because the motorist "may attempt to cross the tracks despite the operation of the flashing light signals—and even lowered gates, if present." DOT Study 4-6.¹⁹

Furthermore, the Secretary has established that the expected speed of trains is an important factor to be considered in determining whether to install an active warning device and, if so, what type of device is appropriate. Thus, the Secretary has specifically required states to install "gates with flashing light signals" where the crossing involves "high speed train operation combined with limited sight distance" or a "combination of high speeds and moderately high volumes of highway and railroad traffic." 23 C.F.R. §§ 646.214(b)(3)(i)(C), (D).²⁰ The Secretary's hazard index formula, which assists state and local authorities in ranking crossings in need of improvements and determining what additional protection is needed, specifically takes into account the expected train speed through the crossing. DOT Handbook at 70; see 23 C.F.R. § 924.9(a)(4)(iii) (requiring use of a hazard-index formula to set priorities). And the Secretary will not grant a petition to exceed the maximum operating speed without first considering, among other factors, "grade crossing protection." 49 C.F.R. § 213.9(c).

These regulations establish that the Secretary has covered the subject matter at issue: the hazard posed by the speed at which trains travel through grade crossings. The Secretary has chosen to regulate subject matter by adopting overall maximum speed limits and then

¹⁹ See also DOT Study 4-20 ("More than half of all rail-highway crossing accidents are the result of a motorist driving around lowered gates or proceeding through flashing red lights without stopping"); DOT Handbook 41, 126.

²⁰ The Secretary's guidance for the placement of warning signs beside the road also expressly takes into account expected train speed. DOT Handbook 131-35.

setting uniform requirements for warning signals that ensure that adequate warning is provided to motorists as long as the train travels within federal speed limits. Having covered that subject matter, the Secretary's regulations pre-empt a state common law duty to proceed at an unspecified, jury-determined "reasonable" speed.²¹

All courts that previously have considered the issue have found that the Secretary's speed regulations pre-empt slower speeds mandated by state common law or municipal ordinance.²² Were this Court to hold that the Secretary's regulation of speed does not cover the subject matter of maximum safe speeds, then potentially every

²¹ Respondent's suggestion (Cross-Pet. 7-9) that the common law duty to reduce train speed at grade crossings is saved from pre-emption by the "local hazard" exception to section 434 is without merit. As the court of appeals correctly held, this exception "is irrelevant" to this case. Pet. App. 6a n.3. The exception, as its language indicates, was merely intended to allow a state to "take charge of purely local hazards." 116 Cong. Rec. 26712 (1970) (statement of Rep. Springer). By definition, a common law duty is not specific to a particular location. It is precisely the kind of "[s]tatewide standard[]" superimposed on national standards covering the same subject matter" that Congress expressly intended to pre-empt. House Report at 4117. And even if the standard were not statewide, its imposition is "incompatible" with federal law and would plainly create "an undue burden on interstate commerce." See *infra* Part II.B.

²² See, e.g., *Smith v. Norfolk & W. Ry.*, 776 F. Supp. 1335, 1342 (N.D. Ind. 1991); *Johnson v. Southern Ry.*, 654 F. Supp. 121, 123 (W.D.N.C. 1987); *Sisk v. National R.R. Passenger Corp.*, 647 F. Supp. 861, 865 (D. Kan. 1986); *Central of Ga. R.R. v. Market*, 410 S.E. 2d 437 (Ga. Ct. App. 1991), *cert. denied*, 1991 Ga. LEXIS 839 (Ga. S. Ct. Oct. 18, 1991); *Santini v. Consolidated Rail Corp.*, 505 N.E. 2d 832, 838 n.4 (Ind. Ct. App. 1987). For cases involving only a municipal ordinance, see, e.g., *CSX Transp., Inc. v. City of Thorsby*, 741 F. Supp. 889, 891 (M.D. Ala. 1990); *Grand Trunk W. R.R. v. Town of Merrillville*, 738 F. Supp. 1205, 1207 (N.D. Ind. 1989); *City of Covington v. Chesapeake & Ohio Ry.*, 708 F. Supp. 806, 808 (E.D. Ky. 1989); *CSX Transp., Inc. v. City of Tullahoma*, 705 F. Supp. 385, 387 (E.D. Tenn. 1988); *Southern Pac. Transp. Co. v. Town of Baldwin*, 685 F. Supp. 601, 603 (W.D. La. 1987); *Chesapeake & Ohio Ry. v. City of Bridgman*, 669 F. Supp. 823, 826 (W.D. Mich. 1987).

community through which a train passes could enact, or enforce through the common law, its own restrictive speed limit. This significant interference with uniform regulation of safety is completely inconsistent with Congress's expressed intention in Section 434 and therefore should be rejected. All state law efforts to regulate the maximum allowable speed—whether by tort liability or by posting speed limits—are pre-empted by Section 434 and the Secretary's regulations.

B. Enforcement Of A Common Law Duty For Railroads To Reduce Train Speed At Grade Crossings Also Would Conflict With FRSA.

Superficially, as the court of appeals acknowledged, a federal maximum operating speed is not necessarily incompatible with a state law duty to travel no faster than is safe. Pet. App. 9a. But the Secretary has addressed the issue of train speed at grade crossings not simply by setting maximum operating speeds, but by having warning devices selected on the basis of the expected train speed. This approach ensures that motorists receive appropriate and consistent warnings of a train's arrival. A common law duty based on different assumptions about efficiency and safety in train travel would force trains to travel substantially slower through grade crossings than they otherwise would. Imposition of such a duty would frustrate the Secretary's approach to the question of train speed.

The Secretary's decision to address the issue of train speed through regulation of the warning devices rather than through lowering speed limits reflects the fact that such limits would be neither an effective nor an efficient way to increase safety. Such limits are not effective because they fail to take into account the fundamental difference between a highway intersection and a railroad grade crossing. The average train is 71 cars (over $\frac{1}{2}$ mile) long and carries 2,644 tons of freight for an average distance of 688 miles. DOT Study 2-1. "Unlike motor vehicles, trains cannot be quickly stopped nor can an

engineer take evasive action to avoid vehicle-train collisions at grade crossings." DOT Report Part I, at 77. Indeed,

A very long distance is required to stop a train. The nature of conventional train braking systems, the limitations imposed by train dynamics, and the predominance of lengthy freight trains combine to make even an emergency brake application a slow and hazardous process, requiring initiation one-half to two miles in advance of the obstacle. Thus, most cases of stalled vehicles are such that there is usually no chance of stopping the train in time to avoid a collision.

Id. at 66. Thus, in 1990, almost 23 percent of all crossing accidents involved train speeds of less than 10 miles per hour, and well over half involved train speeds of less than 30 miles per hour. DOT Crossing Inventory at 20. Having trains traverse crossings at an extremely slow speed itself creates hazards—such as the impatient driver who attempts to cross the track just before the train arrives to avoid a long delay, or the emergency vehicle that is delayed in responding to a life-threatening situation. See *supra* note 19; DOT Handbook 142 (noting that increasing train speeds may increase safety); Brief for Association of American Railroads at pp. 20-26.

Reducing train speed also is not an efficient solution. In 1983, there were "approximately 2.4 crossings per railroad line mile." DOT Handbook 3; see also DOT Study at 2-1, 2-4. Train service simply cannot be provided efficiently if states and localities can impose slow speed limits at each of the more than 1,000 crossings that a freight train passes through on an average line haul. *Id.* As the Secretary recognized in 1972, "[t]he operating costs of decelerating trains to conform to these [local] speed restrictions and then accelerating to maintain the desired operating speed outside of these areas imposes a very significant cost upon railroads. This cost appears to be in the order of \$75 to \$100 million annually." DOT Report Part II at 20. The added delay also "has a detri-

mental effect on smooth and efficient traffic flow" on crossings and adjacent roads. *Id.* at 19; see DOT Study 6-1 (need to minimize cost of delay).

Allowing states to impose a general common law duty to traverse grade crossings at a "safe speed" is plainly inconsistent with the Secretary's approach. The rationale behind such a duty is based on an analogy to highway travel that is fundamentally flawed; trains, except at the slowest speeds, cannot brake in time to avoid collisions with objects in their line of sight, and can never swerve to avoid them. The Secretary's approach recognizes that slowing trains down will not improve crossing safety, and that trains must be able to travel at speeds consistent with the federal requirements if rail freight and passenger service is to remain efficient. Imposing a common law duty that would permit a jury, after the fact, to decide that a train was moving too fast, would conflict with Congress's purpose to achieve a uniform federal approach to railroad safety. Such a duty therefore is pre-empted.

CONCLUSION

The judgment in No. 91-790 should be reversed and the judgment in No. 91-1206 should be affirmed.

Respectfully submitted,

JACK H. SENTERFITT *
RICHARD T. FULTON
JAMES W. HAGAN
ALSTON & BIRD
1201 West Peachtree
Atlanta, Georgia 30309-3424
(404) 881-7000

HOWARD J. TRIENENS
CARTER G. PHILLIPS
MARK E. HADDAD
LAURA V. FARTHING
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioner in No. 91-790

Counsel for Cross-Respondent in No. 91-1206

August 27, 1992

* Counsel of Record

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OFFICE OF THE CLERK

In The
Supreme Court of the United States

October Term, 1992

CSX TRANSPORTATION, INC.,

Petitioner,

vs.

LIZZIE BEATRICE EASTERWOOD,

Respondent.

LIZZIE BEATRICE EASTERWOOD,

Cross-Petitioner,

vs.

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Cross-Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit

BRIEF FOR RESPONDENT IN CASE NO. 91-790
BRIEF FOR CROSS-PETITIONER IN CASE NO. 91-1206

TAMBRA PANNELL COLSTON

JAMES I. PARKER*

WILLIAM L. LUNDY

Counsel for Respondent/

Cross-Petitioner

PARKER AND LUNDY

P.O. Box 1018

Cedartown, Georgia 30125

706-748-5643

*Counsel of Record

BEST AVAILABLE COPY

QUESTIONS PRESENTED

I.

Whether Georgia's common-law duty of due care which requires a railroad to place gate arms at a hazardous railroad crossing is preempted by the Federal Railroad Safety Act.

II.

Whether Georgia's common-law duty of due care which requires a railroad to reduce its speed in a hazardous area is preempted by the Federal Railroad Safety Act.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
SUMMARY OF THE ARGUMENT	3
ARGUMENT	9
I. GEORGIA'S COMMON-LAW DUTY OF DUE CARE WHICH REQUIRES A RAILROAD TO MAINTAIN A SAFE CROSSING IS NOT PRE-EMPTED BY FEDERAL LAW	9
A. <i>The plain language of the Federal Railroad Safety Act does not preempt Georgia's common-law duty of due care requiring a railroad to erect gate arms at a hazardous crossing.</i>	9
B. <i>The legislative and regulatory history of the Federal Railroad Safety Act and federal regulations relative thereto demonstrate no intent to preempt the common-law duty of a railroad to erect gate arms at a hazardous crossing.</i>	12
C. <i>There is no federal rule, regulation, order or standard covering the "subject matter" of when a railroad must erect gate arms at a hazardous crossing.</i>	22
D. <i>There are no federal laws, rules, regulations or standards relating to grade crossing safety which "imply" preemption.</i>	30
i. <i>There is no federal scheme of legislation that occupies the field of grade crossing safety</i>	30

TABLE OF CONTENTS - Continued

	Page
ii. <i>Georgia's common-law duty of due care does not conflict with nor stand as an obstacle to federal objectives.</i>	32
II. GEORGIA'S COMMON LAW DUTY OF DUE CARE WHICH REQUIRES A TRAIN TO REDUCE ITS SPEED IN A HAZARDOUS AREA IS NOT PREEMPTED BY THE FEDERAL RAILROAD SAFETY ACT	35
A. <i>Georgia's common-law does not cover the same "subject matter" as 49 C.F.R. 213.9.</i>	36
i. <i>In adopting 49 C.F.R. 213 the Secretary was addressing the safety of trains and the hazards of derailment.</i>	38
ii. <i>Since the Secretary was not addressing the same "safety concerns" as the state requirement, the same "subject matter" is not covered.</i>	41
B. <i>49 C.F.R. 213 does not imply preemption</i>	42
C. <i>Lower Court decisions finding preemption of municipal ordinances have erroneously construed and misapplied the law</i>	45
III. GEORGIA LAW IS NOT PREEMPTED BY FEDERAL LAW WHERE GEORGIA LAW ADDRESSES A "LOCAL SAFETY HAZARD" ..	47
A. <i>The dangerous grade crossing at Cook Street in Cartersville, Georgia presents a "local safety hazard"</i>	48
B. <i>Georgia's common-law duties to reduce speed and erect gate arms at a hazardous crossing do not create an "undue burden on interstate commerce"</i>	49
CONCLUSION	50

TABLE OF AUTHORITIES

Page

CASES CITED:

UNITED STATES SUPREME COURT

<i>California v. ARC America Corp.</i> , 490 U.S. 93, 109 S.Ct. 1661, 104 L.Ed.2d 86 (1989).....	3, 12
<i>Cipollone v. Liggett Group, Inc.</i> , 112 S.Ct. 2608 (1992).....	10
<i>Fidelity Savings & Loan Ass'n v. Le La Cuesta</i> , 458 U.S. 141, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982)	14
<i>Florida Lime and Avocado Growers v. Paul</i> , 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed. 248 (1963) ..	9, 32, 42, 43
<i>FMC Corp. v. Holliday</i> , 498 U.S. ___, 111 S.Ct. 403, 112 L.Ed. 2d 356 (1990).....	10, 11, 14
<i>Gade v. National Solid Wastes Management Ass'n</i> , ___ U.S. ___, 112 S.Ct. 2374, ___ L.Ed.2d ___ (1992).....	41
<i>Missouri Pacific Railway v. Omaha</i> , 235 U.S. 121, 35 S.Ct. 82, 59 L.Ed. 157 (1914).....	13, 30
<i>Rice v. Santa Fe Elevator Corp.</i> , 331 U.S. 218, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947).....	9
<i>Schneidewind v. ANR Pipeline</i> , 485 U.S. 293, 108 S.Ct. 1145, 99 L.Ed.2d 316 (1988).....	36
<i>Silkwood v. Kerr-McGee Corp.</i> , 464 U.S. 238, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984).....	30, 35, 36
<i>Southern Pacific v. Arizona</i> , 325 U.S. 761, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945).....	50
<i>Wisconsin Public Intervenor v. Mortier</i> , ___ U.S. ___, 111 S.Ct. 2476, 115 L.Ed.2d 532 (1991)	45

TABLE OF AUTHORITIES - Continued

Page

UNITED STATES COURT OF APPEALS

<i>Burlington Northern Railroad Co. v. Minnesota</i> , 882 F.2d 1349 (8th Cir. 1989).....	41
<i>Donelon v. New Orleans Terminal Co.</i> , 474 F.2d 1108 (5th Cir. 1973).....	45, 46
<i>Easterwood v. CSX Transportation Inc.</i> , 933 F.2d 1548 (11th Cir. 1991).....	31
<i>Hatfield v. Burlington Northern Railroad Co.</i> , ___ F.2d ___ (10th Cir. 1992).....	26
<i>Karl v. Burlington Northern</i> , 880 F.2d 68 (8th Cir. 1989).....	31
<i>Mahony v. CSX Transportation Inc.</i> , ___ F.2d ___ (11th Cir. 7/20/92, No. 90-9052).....	45
<i>Marshall v. Burlington Northern</i> , 720 F.2d 1149 (9th Cir. 1983)	26, 31, 32, 33
<i>Missouri Pacific Railroad v. Railroad Comm. of Texas</i> , 850 F.2d 264 (5th Cir. 1988).....	50

DISTRICT COURT OPINIONS

<i>Carson v. Burlington Northern Railroad</i> , No. CV 89-0-513 (D.C. Neb. 7/5/90)	44, 46
<i>Chesapeake & Ohio Railway Co. v. City of Bridgeman</i> , 669 F.Supp. 823 (W.D. Mich. 1987).....	45
<i>City of Covington v. Chesapeake & Ohio Railway Co.</i> , 708 F.Supp. 806 (E.D. Ky. 1989).....	45

TABLE OF AUTHORITIES - Continued

	Page
<i>Consolidated Rail v. Smith</i> , 664 F.Supp. 1228 (N.D. Ind. 1987)	30, 45
<i>CSX v. City of Tullahoma</i> , 705 F.Supp. 385 (E.D. Tenn. 1988)	45
<i>Sisk v. National Railroad Passenger Corp.</i> , 647 F.Supp. 861 (Kan. 1986)	37, 44, 45, 49
<i>Smith v. Norfolk & Western Railway</i> , 776 F.Supp. 1335 (N.D. Ind. 1991)	45
<i>Southern Pacific Transportation Co. v. Maga Trucking Co.</i> , 758 F.Supp. 608 (D.C. Nev. 1991)	37
<i>Southern Pacific Transportation Co. v. Public Utilities Comm'n</i> , 647 F.Supp. 1220 (N.D. Cal. 1986)	41
<i>Southern Pacific Transportation Co. v. Town of Baldwin</i> , 685 F.Supp. 601 (W.D. La. 1987)	45
<i>Union Pacific Railroad Co. v. Public Utility Comm'n of Oregon</i> , 723 F.Supp. 526 (1989)	48

STATE DECISIONS

<i>Florida East Coast Railway v. Griffin</i> , 566 So.2d 1321 (Fla. 1990)	44, 46
<i>Runkle v. Burlington Northern Railroad</i> , 613 P.2d 982 (Mont. 1980)	46

STATUTES CITED:

45 U.S.C. § 421	20
45 U.S.C. § 431	19, 20, 31
45 U.S.C. § 434	passim
45 U.S.C. § 436	20

TABLE OF AUTHORITIES - Continued

	Page
RULES CITED:	
23 C.F.R. 646.200	23
23 C.F.R. 646.210	31
23 C.F.R. 646.214	23, 34
23 C.F.R. 655.601	24
23 C.F.R. 655.602	24
23 C.F.R. 655.603	24
23 C.F.R. 924	24
23 C.F.R. 1204.4	24, 25
49 C.F.R. 213.1	37
49 C.F.R. 213.101	37
49 C.F.R. 213.109	37
49 C.F.R. 213.201	37
49 C.F.R. 213.212	37
49 C.F.R. 213.231	37
49 C.F.R. 213.51	37
49 C.F.R. 213.9	35, 36, 37
49 C.F.R. 225.1	31

TABLE OF AUTHORITIES - Continued

Page

OTHER AUTHORITIES:

H.R. Rep. No. 91-1194, 91st Cong., 2nd Sess. (1970)	20, 21
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<i>Report to Congress, Railroad-Highway Safety, Part I: A Comprehensive Statement of the Problem, (November, 1971)</i>	14, 18
<i>Report to Congress: Railroad-Highway Safety, Part II: Recommendations for Resolving the Problem, (August, 1972)</i>	passim
<i>Rail Highway Crossings Study; Report of the Secretary of Transportation to the United States Congress (April, 1989)</i>	6, 13, 14, 15, 16, 25
<i>U.S. Manual for Uniform Traffic Control Devices, (1988) (No. FHWA-SA-89-006)</i>	passim
<i>U.S. DOT, Rail-Highway Grade Crossing Handbook, (2nd Ed. 1986) (No. FHWA-TS-86-215)</i>	26, 27, 28, 32, 33

Nos. 91-790 - 91-1206

In The
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CSX TRANSPORTATION, INC.,

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BRIEF FOR RESPONDENT IN CASE NO. 91-790
 BRIEF FOR CROSS-PETITIONER IN CASE NO. 91-1206

STATEMENT OF THE CASE

Factual Background

On the morning of February 24, 1988, Thomas Eastwood went to work at Duncan Wholesale in Cartersville, Georgia, where he had been a delivery truck

driver for nineteen years. He loaded his long bed International truck and left for his first delivery.

It was a cold, clear winter day as Mr. Easterwood came to the Cook Street railroad crossing at approximately 8:52 a.m.. He was driving slowly and carefully east toward the crossing (R. at V.3, D.24, affidavit of Tim Shepherd, p.1) at a speed of about 10 miles per hour, with the morning sun shining on his windshield (R. at V.4, D.28, Ex.6, p.4). At the same time a CSX engine was running backward (with the long end forward) pulling one car (R. at V.4, D.28, Ex. 5,6). The train approached the Cook Street crossing at a speed of between 32 and 50 miles per hour. (R. at V.4, D.28, Ex. 5,6; V. 3, D.24).

Mr. Easterwood attempted to negotiate this hazardous crossing in his long bed truck apparently unaware of the oncoming train. The crossing was equipped only with flashing lights and bells which activated a moment before Mr. Easterwood passed. Mr. Easterwood was killed when his truck was violently struck by Petitioner's train. (R. at V.3, D.24, p.1 Affidavit of Tim Shepherd).

The Cook Street crossing had been the scene of at least seven grade crossing collisions since 1981. (R. at V.4, D.28, affidavit of Thomas Culpepper and attachments thereto) due in part to the existence of hazardous conditions in the immediate vicinity. First, the curve in the track just north of the crossing permits only 150 feet of sight distance for a motorist looking for a train. (Depo. of Fogarty, p.61). Second, the vegetation that had been allowed to grow along the side of the track obscured and hindered a motorists' vision who attempted to negotiate the crossing. And third, the existing signals at the crossing frequently malfunctioned and produced false warnings, (Depo. of Burnham, p.28, 1.4-8).

The Cook Street crossing is heavily utilized by vehicular traffic, as it is located near the center of Cartersville, with its track running adjacent and parallel to one of the city's busiest streets.

Petitioner has charged the Railroad with negligence in failing to install gate arms at this crossing and with negligence in failing to reduce its speed under the then existing circumstances.

SUMMARY OF THE ARGUMENT

The present case presents the question of federal preemption of two traditional state interests; i.e. the state's common law duties requiring a railroad to erect gate arms at a hazardous crossing and reduce their speed at such crossings. Because this case involves the preemption of Georgia's traditional police power, Respondent/Cross-petitioner is initially entitled to a presumption that her claims against CSX are not preempted. *California v. ARC America Corp.*, 490 U.S. 93, 109 S.Ct. 1661, 104 L.Ed. 2d 86 (1989).

In deciding whether the *Federal Railroad Safety Act* preempts these two historic state law duties, this Court must begin with the plain language of the statute. 45 U.S.C. § 434 contains three components, each of which demonstrate that Congress intended to broadly preserve the authority of the states in regulating rail safety and intended to preempt state authority in only one narrowly defined circumstance. Congress did so by broadly preserving state law "relating to" railroad safety until the Secretary of Transportation adopts a rule covering the subject matter of the state requirement. Congress then reinstated state regulations "relating to" a subject matter

covered by the Secretary where state law addresses a "local safety hazard". To avoid a lapse in regulation and to avoid the "enactment of a broad authorizing federal statute from preempting the field . . . " Congress only allowed preemption of state law when the Secretary adopts *specific* rules completely covering the same subject matter of the state requirement. *Railroad Safety and Hazardous Materials Control: Hearings on H.R. 7068, H.R. 14417, H.R. 14478 and S. 1933, 91st Cong., 2nd Sess. 51 (1970).*

The Secretary has passed no preemptive regulations which cover the subject matter of when a railroad must erect gate arms at a hazardous crossing not updated with federal funds. Nor has the Secretary passed preemptive regulations completely covering the subject matter of train speed.

Legislative history along with the history of the railroad grade crossing problem support the contention that the FRSA was never intended to broadly preempt these two state tort law duties.

States have always maintained an active role in the selection of grade crossing protection devices, and in regulating the speed of trains. The federal government, since 1916, has assisted the states and the railroad in reducing accidents and deaths at grade crossings by providing funds, guidance and coordination. Railroads have always been responsible for making their crossings safe and reducing their speed to a speed reasonable and safe under the existing conditions. Despite the infusion of federal money in 1916 and 1933 deaths and injuries at grade crossings continued to escalate. In response Congress passed the *Federal Railroad Safety Act (FRSA)* and the

Federal Highway Safety Act (FHWA) which provide mechanisms for the appropriation of federal funds to assist in alleviating the high number of accidents at railroad grade crossings and "to reduce deaths and injuries to persons".

The railroad advances the argument that the Congress and the Secretary, in attempting to promote safety and reduce accidents, simultaneously choose to remove the railroad's state law duties and absolve them of all liability when they travel at a speed up to 110 mph through a city with inadequately protected grade crossings. Mrs. Easterwood advances the argument that the FRSA and FHWA only provide mechanisms for the receipt of federal funds to improve grade crossings. Traditional principals of state tort law were preserved to ensure a "continuing interest on the part of the railroad in bringing about a reduction in grade crossing accidents". *Report to Congress: Railroad Highway Safety, Part II: Recommendations for Resolving the Problem, (August, 1972) p.27.*

In an attempt to support its argument that the Secretary has "covered the subject matter" of grade crossing protection and simultaneously absolved them from liability, the railroad points to the *Code of Federal Regulations (C.F.R.)* and to selected language in the *Manual on Uniform Traffic Control Devices (MUTCD)*. The C.F.R., however, only applies to crossings updated with federal funds and merely provides guidelines for prioritization of crossings eligible to receive those funds. The MUTCD has no warrants which specify "the installation of certain devices at crossings with certain characteristics". *Rail*

Highway Crossings Study; Report of the Secretary of Transportation to the United States Congress, (April, 1989) p.4-8.¹

Nevertheless, the railroad argues that the MUTCD grants the exclusive authority to the states for the selection of traffic control devices and so the railroad is no longer responsible for making their crossings safe. This argument is clearly contradicted by the express language of the MUTCD, the DOT Handbook and the Secretary of Transportation herself.² The MUTCD and the DOT Handbook continually state that the responsibility for the determination and need of traffic control devices is shared between the railroad, state and the local agency with jurisdiction over the crossing. Nothing in the C.F.R. or MUTCD prevents a railroad from determining that improved grade crossing devices are needed, seeking approval from the state and implementing the devices with their own funds should the request be approved but federal funds not be made available. Granted, if the state or local agency refused the railroad's request, the railroad would have an excellent defense to a negligence claim based on a duty to improve the crossing. This question, which is not presented by the present case, however, is a question of state tort law, not one of federal preemption.

¹ The Solicitor General as Amicus Curiae also argues that there is no standard in the MUTCD which "purport[s] generally to determine the circumstances in which a particular safety device is needed" (p.21). The Solicitor argues also that the regulations in the C.F.R. apply only to projects being updated with federal funds (p.19).

² The Secretary of Transportation has never construed the law as vesting the state agencies with the exclusive duty to determine the need for and selection of grade crossing devices. (Brief of the Solicitor General, at p.13).

The railroad however argues that they are no longer required to pay a share of the cost of a federally funded improvement, or any other improvement because the Secretary has determined that grade crossing protection is of no benefit to the railroad. This is totally false. The Secretary, in determining the benefit of improved grade crossing protection took into consideration the benefit received by the railroad of reduced tort liability. The Secretary determined however that because the railroad is responsible for maintaining these devices once they are installed, and the maintenance cost is greater than the reduction in tort liability, there is no "net benefit" to the railroad. *Report to Congress, Railroad Highway Safety, Part II*, p.27, p.103 (Emphasis added). Elimination of tort liability, therefore, would destroy the basis used in designing the Secretary's scheme of regulation.

Similarly, in implementing railroad safety rules regarding speed, the Secretary recognized speed restrictions imposed on the railroad by state requirements and local ordinances. CSX cites a portion of the Secretary's August, 1972 report to support its argument that the Secretary intentionally removed state speed restrictions due to a concern over the cost to the railroad in accelerating and decelerating trains. (Cross-respondent's brief at p.49). CSX fails however, to inform the Court that the Secretary further stated in this regard that "[i]t is assumed that these restrictions would be removed in each area where all grade crossings along a given rail line were eliminated" by the construction of an overpass or underpass. *Report to Congress: Railroad Highway Safety, Part II: Recommendations for Resolving the Problem*, (August, 1972, p.38).

The Secretary, therefore, clearly expected state speed restrictions to remain in full force where trains travel across public roads at grade. It follows that the Secretary, in enacting 49 C.F.R. 213 which clearly controls train speed to prevent derailments, did not intend to set forth a national maximum safe speed at all grade crossings. The Secretary intended only to regulate a perceived cause of derailments which were of particular concern to Congress due to the increased frequency in transporting hazardous materials. *Senate Report*, 91-619. No speed regulation exists in the C.F.R. addressing the same subject matter as the state common law which addresses maximum safe speeds through municipalities, across grade crossings and under hazardous conditions.

No conflict exists between the federal regulations and the state duties of care to reduce speed in a hazardous area and erect gate arms at a hazardous crossing. The railroad can easily comply with both the state and federal requirements. In fact, absolving the railroad of liability in tort would *create* a conflict. As the stated purpose of the FRSA is to prevent railroad related accidents, deaths and injuries, it would be counter productive to supplant the most effective method the law has ever developed for controlling negligent behavior; that being the state common-law.

ARGUMENT

I. **GEORGIA'S COMMON-LAW DUTY OF DUE CARE WHICH REQUIRES A RAILROAD TO MAINTAIN A SAFE CROSSING IS NOT PREEMPTED BY FEDERAL LAW.**

In determining whether state law is preempted, the Court must first determine Congress's intent in enacting § 434 of the Federal Railroad Safety Act. No preemption exists in absence of a clear intent by Congress to displace state law. Courts have traditionally been reluctant to preempt state laws in areas within the state police power *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 230, 67 S.Ct. 1146, 91 L.Ed.1447 (1947). A state tort law remedy is within this historic power. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed. 248 (1963). Accordingly, Respondent is entitled to an initial presumption in her favor that her claims against CSX are not preempted.

A. **The plain language of the Federal Railroad Safety Act does not preempt Georgia's common-law duty of due care to erect gate arms at a hazardous crossing.**

The *Federal Railroad Safety Act* (hereinafter referred to as the "FRSA") authorizes the preemption of state regulations of railroad safety in certain narrowly defined circumstances. 45 U.S.C. § 434 provides:

The Congress declares that laws, rules, regulations, orders and standards relating to railroad safety shall be nationally uniform to the extent practicable. A state may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such

time as the Secretary has adopted a rule, regulation, order or standard *covering the subject matter of such state requirement*. A state may adopt or continue in force an additional or more stringent law, rule, regulation, order or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard and when not creating an undue burden on interstate commerce. 45 U.S.C. 434 (Emphasis supplied)

Determination of Congressional intent is always the primary consideration in a preemption analysis of a federal statute. To accomplish this task, the Court historically "begin[s] with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose" *FMC Corp. v. Holliday*, 498 U.S. ___, 111 S.Ct. 403, 112 L.Ed. 2d 356 (1990). Additionally, express preemption provisions are to be narrowly interpreted. *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608 (1992).

Congress has clearly preserved state law in § 434. Three distinct provisions of the Act support this contention. First, Congress declared that the laws relating to railroad safety shall be nationally uniform "to the extent practicable". This language demonstrates Congressional recognition that the laws governing railroad safety cannot be completely uniform. Second, Congress expressly stated that states "may adopt, or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order or standard covering the subject matter of such state requirement."

The first part of this sentence clearly provides states with broad regulatory authority in areas of railroad

safety. The statute provides that states may "adopt or continue in force any law, . . . relating to railroad safety . . .". Because the phrase "Relating to" is held to have a very broad meaning, *F.M.C. Corp.*, 111 S.Ct. at 407, it is clear that Congress intended a broad grant of regulatory authority to the states.

In this statement, Congress reaffirmed broad state power, then narrowed the preemptive reach of federal regulation. Congress narrowed the states broad regulatory authority only when the Secretary "adopts a rule, regulation, order or standard *covering the subject matter of such state requirement*".³ Congress therefore, required the Secretary to adopt specific rules which cover the same subject matter as the state requirement before state law is preempted.

Congress then included an exception in § 434 which expressly allows state regulation when necessary to reduce or eliminate a local safety hazard.⁴ Again, Congress preserved broad regulatory authority in the states by continuing any state regulation "*relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard. . . .*".

Examination of the broad language, "relating to" used by Congress in the statute, clearly indicates that Congress intended a broad construction of the authority reserved to the states. In contrast, this broad language is

³ "Subject matter" is defined as "the subject, or matter presented for consideration; the thing in dispute" *Black's Law Dictionary*, 5th Ed.

⁴ And when not incompatible with a federal rule and not placing an undue burden on interstate commerce.

not used in the preemption provision itself and so does not support the same broad construction.

To determine whether Respondent/Cross-Petitioner's claims are preempted by 45 U.S.C. § 434, this Court must decide (1) whether the duties imposed on CSX by Georgia's tort law cover the subject matter of a regulation adopted by the Secretary; and (2) if so, whether the Cook Street railroad crossing presents a "local safety hazard" which the state may still regulate. Since a finding of preemption in this case will displace the traditional police power of a state, the requisite analysis must be approached with a disposition that the state law is not preempted. *California v. ARC America Corp.*, 490 U.S. 93, 109 S.Ct. 1661, 104 L.Ed. 2d 86 (1989).

B. The legislative and regulatory histories of the Federal Railroad Safety Act and federal regulations relative thereto demonstrate no intent to preempt the common law duty of a Railroad to maintain a safe crossing.

The issues presented in the instant case are as old as the railroads themselves. A battle over the responsibility for grade crossing safety has raged since the railroad first appeared on the scene in the 1830's. When railroads were first built, states welcomed this new transportation and freely allowed the railroads to build their tracks across existing streets and roads at grade. This allowed the railroads to avoid the high cost of grade separations, but the railroad remained responsible for making their crossings safe. Inherent and consistent with such responsibility was (1) the duty to provide and implement safety devices; and (2) the duty to pay common law tort damages if applicable.

Despite imposing responsibility on the railroad, states maintained an active role in identifying crossings that needed improvement and required railroads to pay for all or part of the cost of improving a grade crossing. *Missouri Pacific Railway v. Omaha*, 235 U.S. 121, 35 S.Ct. 82, 59 L.Ed. 157 (1914).

As the automobile became more popular, more roads were built and traffic across railroads increased. Increasing grade crossing protection projects led Congress to authorize federal-aid highway funds to the state to help defray some of the expense. The *Federal Aid Road Act of 1916* required the states to match federal funds on a 50-50 basis. States could and usually did require the railroads to pay the state's share of the cost. *Rail Highway Crossings Study* (April, 1989, p.1-8).

In 1933 the *National Industrial Recovery Act* authorized another \$300 million to the states to improve crossing safety. Again, Congress was unable to solve the problem because notwithstanding the infusion of federal money, the number of crossing accidents continued to increase in direct proportion to an increase in highway construction projects. From 1933 to 1970 three constants remained: (1) The states remained involved in identifying and monitoring grade crossing improvement projects, (2) The railroads remained responsible for full or partial funding and (3) The railroads remained liable for tort damages for loss of life or property proximately caused by their unsafe railroad crossings. All that federal law changed was that the railroad industry was provided some relief by federal appropriation for the high cost of grade crossing improvements.

Despite federal involvement, fatalities at grade crossings continued to increase and in response, the Congress

passed the *Federal Highway Safety Act* (FHSA) and the *Federal Railroad Safety Act* (FRSA). Together the two acts directed the Secretary of Transportation to study the grade crossing problem, make recommendations for appropriate action and recommend how the improvements should be funded. Two reports to Congress were prepared by the Secretary of Transportation in response to the mandates of the FRSA and the FHSA, to wit: *Reports to Congress, Railroad-Highway Safety, Part I: A Comprehensive Statement of the Problem*, (November, 1971) and *Part II: Recommendations for Resolving the Problem*, (August, 1972). Because the decision of whether state law is preempted under the FRSA turns on the intent of the Secretary of Transportation, *FMC Corp. v. Holliday*, 498 U.S. ___, 111 S.Ct. 403, 112 L.Ed. 2d 356 (1990), *Fidelity Federal Savings & Loan Ass'n v. Le La Cuesta*, 458 U.S. 141, 102 S.Ct 3014, 73 L.Ed.2d 664 (1982) as well as the intent of Congress, the two reports are probative of the issues presently before the Court.

In 1989, the Secretary of Transportation, in a report to Congress on grade crossing safety, made a number of statements that are wholly inconsistent not just with petitioner's position but with the Solicitor General's as well. For example, the Secretary flatly stated that "in most cases, the courts still hold the railroad responsible for crossing accidents," U.S. Department of Transportation, *Rail-Highway Crossings Study: Report of the Secretary of Transportation to the United States Congress* at 3-1 (April 1989). If the Secretary had sought to change that state of affairs, in whole (as Petitioner says) or in important part (as the Solicitor General says), surely the Secretary would have informed Congress of what she thought she had done.

Similarly, the Secretary's Report to Congress states:

Accident liability costs are a significant and escalating concern. . . . From a future program standpoint, liability costs can best be addressed and, it is hoped, reduced through improved levels of devices at crossings, and the achievement of maximum effectiveness from the system components.

Id. at 4, 7-6. If the Secretary had sought to "address[]" and "reduce[]" liability costs through preemption, surely she would have mentioned that as an aspect of the "future program." But she said nothing of the kind.

Until recently railroads were allocated a portion of the cost of federally funded grade crossing improvements equal to the "net benefit [they] received" *Rail Highway Crossings Study*, (April, 1989, p.1-7) (Emphasis added). Petitioner repeatedly asserts that because they are no longer responsible for paying any portion of the improvement the Secretary has determined that the railroad does not benefit from crossing protection. In fact, the opposite is true. In deciding that there was no *net* benefit, the Secretary assumed that railroads would be held liable for accidents and that reducing the number of accidents would benefit the railroads. The Secretary concluded, however, that that benefit was "offset".

Railroad benefit from the installation of train activated devices can be measured in terms of the anticipated reduction in grade crossing accidents. This in turn brings about some reduction in the cost of *claims for personal injuries, fatalities, and vehicle damage* resulting from accidents which otherwise may occur at the crossing. (Emphasis added)

. . . .

Analysis of data available indicates also that the average claim payment made by the railroads as the result of an accident at a crossing with modern automatic protection is substantially less than the average claim payment resulting from an accident at a crossing with ordinary passive crossbuck protection. Report to Congress, *Railroad Highway Safety Part II: Recommendations for Resolving the Problem*, at 103 (August, 1972)

At the time of the Secretary's 1972 study, railroads were responsible for paying a sum equal to the net benefit received from the federally funded improvement; up to 10% of the total cost. If the State does not plan to use federal money however, it may require a larger payment from the railroad. *Rail Highway Crossings Study, Report of the Secretary of Transportation to the United States Congress*, at 3-1 (April, 1989).

In calculating the "net benefit" to the railroad, the Secretary recognized that the responsibility for maintaining grade crossing devices, in most cases, is solely the railroad's.⁵ Report to Congress: *Railroad-Highway Safety Part II: Recommendations for Resolving the Problem*, at 27 (August, 1972). Further, the Secretary took into consideration that this maintenance cost usually offset the benefit that the railroad received in reduced tort liability:

In broad perspective, the aggregate annual cost to the railroads for maintenance and operation of grade crossing protection and for providing watchmen is already substantially more than the annual cost of death and personal injury claims

⁵ Georgia places the entire responsibility of maintaining railroad crossing improvement devices on the railroad Report to Congress: *Part II* (August, 1972, p.21)

resulting from grade crossing accidents. *Id.* at 103.

The railroad is no longer required to share in the cost of a federally funded improvement because that cost is greater than total tort liability. The fact that the railroad remains liable in tort leads to the conclusion that there is no "net benefit" to the railroad.⁶

Aside from considering tort claims in calculating the "net benefit" to the railroad of federally funded crossing improvements, the Secretary has continuously recognized a value in state tort law remedies for accomplishment of Congressional objectives of promoting safety. In discussing continued railroad involvement in safety projects the Secretary explained that because the railroad pays about \$21 million a year in personal injury and death claims, a "continuing interest on the part of the railroads in bringing about a reduction in grade crossing accidents" is justified. *Id.* at 103. The Secretary stated the obvious, that so long as railroads are liable for unsafe crossings, their interest in improving these crossings will continue. The railroad's interest in improving safety is essential to a workable program because success requires their cooperation.

The Secretary set forth several conclusions relative to the grade crossing problem. First, deaths and injuries at grade crossings continue to escalate, but decrease when federal aid is available to improve the crossings. Second,

⁶ Railroads must still share in the cost of grade crossing elimination projects however. *Id.* at 104. Where grade crossings are completely eliminated by the construction of an overpass or underpass there is no maintenance cost to the railroad. Therefore, the railroad benefit of reduced tort liability is not offset where these crossings are completely eliminated.

because of the nature of grade crossings, improvement projects must be a *joint effort* between states, railroads and local governments as all three entities have a stake in the crossing. Third, the past federal legislation had served its purpose but there was still no coordinated effort to resolve the problem.

Congress addressed these issues in its traditional manner; by providing funds, guidance and coordination. To promote a coordinated effort, Congress vested the authority to oversee the project in the Secretary of Transportation.

Because federal funds are apportioned to the several states, the states assume responsibility for programming crossing improvement projects to receive the money. Railroads are responsible for design, construction and maintenance of the improvements on their right of way. The federal role is "one of overseer to ensure that federal dollars are appropriately spent". *Id.* at 3-2, 3-3. (*Railroad Highway Safety, Part I: A Comprehensive Statement of the Problem* (November, 1971) and *Part II: Recommendations for Resolving the Problem* (August, 1972)).

In both reports to Congress, the Secretary identified as problems the lack of consistent signing at railroad crossings and the existence of differing local traffic laws relating to a motorist's duty. *Part I, Id.* at p.55. Concern over non-uniformity of traffic control devices led to the first publication of the *Manual on Uniform Traffic Control Devices* (hereinafter referred to as MUTCD). *Id.*

at 59. In the case of train activated warning devices, motorists were not receiving a uniform warning time at train approach. *Id.* p.62. There was also no coordinated effort to gather accident statistics which would help

identify the hazards that prompt grade crossing accidents. *Part II, Id.* at p.58.

Congress responded to these inconsistencies by enacting 45 U.S.C. § 434 which proposes that "laws . . . relating to railroad safety shall be nationally uniform to the extent practicable". Upon a reading of this Section in light of the Secretary's reports, it becomes clear that Congress was addressing uniformity of warning devices and uniformity of laws regulating a motorist's duty at crossings. The Secretary constantly emphasized the importance of driver response to traffic control devices and the problem with differing traffic laws. A motorist must be able to immediately recognize the sign or signal ahead, know its meaning and know his required response. The uniformity of the signal increases motorist awareness of the hazard ahead. Uniform laws regulating the motorist's response to that signal promote a shorter decision making process. Uniformity of signals and laws therefore promote safety by increasing predictable driver behavior.

The phraseology of § 434 of the FRSA was not intended to preempt state tort remedies for negligent acts and omissions by a railroad with respect to grade crossings for which the railroad is responsible. Nor does the language of § 431 which authorizes the Secretary to "prescribe as necessary, appropriate rules, regulations, orders, and standards for *all areas of rail safety*" intend to state a preemptive purpose.

Congress included this language to ensure that the FRSA would reach as far as the commerce clause would allow rather than be limited to common carriers engaged in interstate commerce. Older safety statutes had only applied to common carriers engaged in interstate and

foreign commerce by rail. In the House Committee Report the term "all areas of railroad safety" was explained as follows:

This legislation is intended to encompass all those means of rail transportation as are commonly included within the term. Thus 'Railroad' is not limited to the confines of 'common carrier by railroad' as that language is defined in the Interstate Commerce Act". H.R. Rep. No. 91-1194, 91st Congress, 2nd Sess. at 16 (1970) See Also "The Extent and Exercise of FRA Safety Jurisdiction" at 49 C.F.R. Ch. II (10-1-90 edition) p.36.

Accordingly, Congress did not intend use of the phrase "in all areas of railway safety" in a preemptive context. The phrase is further defined in 45 U.S.C. § 431(k) which provides that "the term 'all areas of railroad safety' includes the safety of commuter or other short-haul rail passenger service in a metropolitan or suburban area, including any commuter rail service which was operated by the Consolidated Rail Corporation as of January 1, 1979".

To support its argument that "all areas of railroad safety" carries an implicit grant of preemptive power, Petitioner cites the Court to selected language contained in the House Reports without regard to context. In the report "The Role of the State in Rail Safety", Congress debated the proper role of the state regulatory commissions in enforcing federal regulations. The states were urging Congress to permit them to enforce federal regulations but Congress was unwilling to do so except to the limited degree permitted under 45 U.S.C. § 436. *Id.* at 4117-4119. From this debate, Petitioner extracts language relative to Congressional concern over "subjecting the

national rail system to a variety of enforcement in 50 different judicial and administrative systems" *id.* at 4108, 4109. (See Pet.Brief, p.7, p.18, p.41). Congress was addressing *who* would be responsible for enforcing the federal rules, not *what* rules would be enforced. By taking matter out of context Petitioner creates the impression that Congress was concerned with differing laws or standards, when in reality, Congress was concerned only with differing and multiple enforcement agencies. H.R. Rep. No. 91-1194, 91st Cong., 2nd Sess., (1970).

In concluding that Congress did not intend to preempt the field it is important to note the stated purpose of the FRSA; to wit:

The purpose of this Act is "to promote safety in all areas of Railroad operations and to reduce Railroad-related accidents, and to reduce deaths and injuries to persons and to reduce damage to property caused by accidents involving any carrier of hazardous materials" 45 U.S.C. § 421

Additionally, the Secretary noted that continued tort responsibility insures the railroad's continued interest in "bring[ing] about a reduction in grade crossing accidents" *Report to Congress: Railroad Highway Safety, Part II: Recommendations for Resolving the Problem* at 103 (August, 1972).

The clear and unambiguous language of the FRSA, its legislative history and common-sense dictate the conclusion by this Court that Congress never intended to broadly preempt the entire field of railroad safety. Congress meant what it said and said what it meant: only when the Secretary adopts a rule covering the subject

matter of the state requirement does the state law give way.⁷

C. There is no Federal rule, regulation, order or standard covering the "subject matter" of when a railroad must erect gate arms at a hazardous crossing.

To determine whether the Secretary has adopted a rule regulating the same "subject matter" as the state requirement, the state requirement at issue must first be defined. At issue in the instant case is the historical duty which Georgia's common-law imposes on a railroad, to wit; the duty to erect gate arms at a hazardous crossing. In order to determine whether this common law duty falls within the same subject matter of an area presently regulated by the Secretary, an analysis must be made of the relevant federal statutes, regulations and standards. Petitioner contends that several sections of the *Code of Federal Regulations* cover the subject matter of the state requirement. Analysis of each regulation separately establishes that the Secretary has not promulgated a pre-emptive regulation in the area of a railroad's duty to erect gate arms.

Petitioner first relies on 23 C.F.R. 646. Section 646 states as its purpose the following:

(a) The purpose of this subpart is to prescribe policies and procedures for advancing *Federal-aid projects* involving railroad facilities.

⁷ And not even then if the state law is addressing a "local safety hazard".

(b) This subpart and all references hereinafter made to "projects" applies to Federal-aid projects involving railroad facilities including projects for the elimination of hazards or railroad highway crossings, and other projects. . . .

23 C.F.R. 646.200 (Emphasis added)

This stated purpose of the regulation clearly provides that its mandates are *only* applicable to federally funded projects⁸. This federal regulation does not relieve a railroad of its duty to install gate arms at a hazardous crossing.

Petitioner is correct in contending that § 646 requires uniform standards for implementing devices installed with federal aid. Section 646.214(b) states however, that "[a]ll traffic control devices proposed shall comply with the latest edition of the Manual on Uniform Traffic Control Devices for Streets and Highways *supplemented to the extent applicable by State standards*" (Emphasis added).⁹

Petitioner also cites § 646 for the proposition that the selection of traffic control devices is the *sole* responsibility of the state agency with jurisdiction over the crossing. That statement is directly contradicted by the express language of the regulation. Section 646.214(4) states that "[f]or crossings where the requirements of 646.214(b)(3) (describing adequate warning devices for federal aid projects) are not applicable, the type of warning device to be installed, whether the determination *is made by a State*

⁸ This conclusion is also urged by the Solicitor General as *Amicus Curiae* at p.19.

⁹ By expressly allowing state law to supplement the federal regulations, the Secretary demonstrated a recognition that these regulations do not cover the entire "subject matter" of grade crossing safety nor do the Federal Regulations "occupy the entire field" of railway safety.

regulatory agency, State highway agency, and/or the railroad is subject to the approval of FHWA" (Emphasis added). This section unequivocally demonstrates the Secretary's recognition that the railroad would continue to be involved in the decision making process.¹⁰

Petitioner relies also on 23 C.F.R. 655.601 and .603. These sections require states to schedule improvement projects on a priority based index to receive federal funds. They do not require the states to decide which crossings will be made safe. Again, one must look to the stated purpose of this section:

To prescribe the policies and procedures of the Federal Highway Administration (FHWA) to obtain basic uniformity of *traffic control devices* on all streets and highways in accordance with the following references that are approved by the FHWA for application on *Federal-aid projects*. (Emphasis added).

To obtain "basic uniformity of traffic control devices" the Secretary adopted the MUTCD as the national standard "for application on any highway project in which Federal highway funds participate" § 655.602(a). As recognized by this section, the MUTCD's primary function is to provide uniform signalization, not uniform national law.

Petitioner also relies on 23 C.F.R. 924.7-11 and § 1204 which require states to implement a program to study their crossings and improve safety. Section 924 requires

¹⁰ Respondent's contention in this regard is furthered by the Solicitor General at p.13 of his brief as Amicus Curiae where he states that the Secretary of Transportation has never construed the law as vesting the state agencies with the exclusive duty to determine the need for and selection of grade crossing devices.

states to prioritize their grade crossings based on a hazard index formula as a prerequisite to the receipt of federal funds; § 1204.4 sets forth guidelines aimed at reducing *all traffic accidents*. Petitioner concludes that because Georgia is required to prioritize these crossings, railroads are no longer responsible for determining when a crossing is hazardous.

Reading and analyzing these regulations, however, simply indicates that the Secretary wanted states participating in federally funded programs to study their own grade crossing problems and set up a priority list for those eligible for federal funds. For states participating in the federally funded program, § 655 requires adoption of the national standards of the MUTCD to ensure uniform devices and that federal funds are well spent.

The MUTCD is an engineering manual adopted by the Secretary to provide guidance to state and railroad traffic engineers. It was not designed to supplant state law and insulate railroads from liability. If the Secretary decided to exercise the authority to preempt state law, surely these preemptive regulations would be found somewhere other than in the broad language of an engineering manual.

"Other than the requirements for installation of certain passive control devices (crossbuck, advance Warning Sign, and certain pavement markings) at all public rail-highway crossings, there are no warrants in the MUTCD to specify the installation of certain devices at crossings with certain characteristics" *Rail Highway Crossings Study; Report of the Secretary of Transportation to the United States*

Congress (April, 1989) p.4-8.¹¹ The MUTCD recommends that the decision of which type of traffic control device to be used, should rest on an engineering and traffic investigation made by a diagnostic team. This diagnostic team consists of, at a minimum, a highway traffic engineer and a *railroad signal engineer*. *Id.* at 4-9 (Emphasis added). After this evaluation "the determination of need and selection of devices at a grade crossing is made by the public agency with jurisdictional authority" MUTCD, 8A-1.

In *Marshall v. Burlington Northern*, 720 F.2d 1149 (9th Cir. 1983), and *Hatfield v. Burlington Northern Railroad Co.*, ___ F.2d ___ (1992) § 8A-1 of the MUTCD was erroneously construed as giving the public agency the exclusive duty to select the device to be installed. The Secretary herself, does not interpret this statement in the MUTCD as giving the local jurisdiction exclusive authority over the selection of traffic control devices:

Often the highway engineer and the railroad engineer will share responsibility at the grade crossing. The extent of their responsibilities will vary depending on State laws and practices; however, both must be involved in the decision making process and both must have an understanding of the interaction between train, motor vehicle and control devices. ("D.O.T. Handbook" at 8A, Emphasis Added). (See also p.13 of the Solicitor's brief as Amicus Curiae)

Petitioner urges this Court to adopt the *Marshall* and *Hatfield* Courts' construction, a construction contradicted

¹¹ The Solicitor General also argues that there are no standards in the MUTCD which "purport generally to determine the circumstances in which a particular safety device is needed" (See p.21 of the Solicitor's brief as Amicus Curiae)

by the Secretary in the DOT Handbook expounding on the MUTCD, and by the language of the provision itself. 8A-1 of the MUTCD reads in full:

The highway agency and the railroad company are entitled to jointly occupy the right of way in the conduct of their assigned duties. This requires joint responsibility in the traffic control function between the public agency and the railroad. The determination of need and selection of devices at grade crossings is made by the public agency with jurisdictional authority. Subject to such determination and selection, design, installation and operation shall be in accordance with the national standards contained herein.

The MUTCD is a federally mandated manual. This provision delineates the relationship between state and federal agencies. It simply provides that the responsibility for selecting traffic control devices is not a federal function. Other sections of the MUTCD support this contention. Immediately preceding 8A-1, the MUTCD provides:

With due regard for safety and for the integrity of operations by highway and railroad users, the highway agency and the railroad company are entitled to jointly occupy the right of way in the conduct of their assigned duties. This requires joint responsibility in the traffic control functions between the public agency and the railroad.

Section 8D-1 of the MUTCD further provides:

Based on an engineering and traffic investigation, a determination is made whether any active traffic control devices are required at a crossing and, if so, what type is appropriate. Before a new or modified grade crossing traffic control system is installed, approval is required

from the appropriate agency within a given state.

If only the state had jurisdictional authority to determine a need for and select the proper safety device at a grade crossing, there would be no need to require approval by the state before an installation could be undertaken. The language of the MUTCD clearly contemplates railroad requests for improved crossing protection. Granted, if the state refused to allow the railroad to improve crossing protection, the railroad might well have an excellent defense to a state tort claim based on a duty to upgrade the crossing. This question, which is not presented by the instant case, is a question of state tort law, not one of federal preemption.

The statement in the MUTCD which permits the agency with jurisdiction over the crossing to select the device used, merely "describes the process that has long governed the selection of traffic control devices" (Brief of Solicitor General at p.23). The Secretary in the D.O.T. Handbook recognizes this longstanding procedure.

It is important to remember that several agencies, both public and private can be involved when improvements are considered at a railroad highway grade crossing. These include:

- * The railroad,
- * The State agency responsible for regulating railroad highway grade crossings,
- * The agency responsible for the roadway crossing the railroad (state, county or city)

("D.O.T. Handbook", 8A-6)

The Secretary also recognizes the longstanding principal of tort liability.

Liability for accidents occurring at grade crossings is governed by the law of negligence. The

law imposes upon states and railroads the duty to exercise reasonable care to avoid injury to persons using the highway. States and railroads are under no duty to provide absolute safety.

It has been suggested that agencies and railroads could *significantly reduce tort liability* suits involving traffic control devices by implementing four basic principals.

Know the laws relating to traffic control devices,

Conduct and maintain an inventory of devices,

Replace devices at the end of their effective lives,

Apply approved traffic control device specifications and standards.

("Railroad Grade Crossing Safety Handbook", p.27)
(Emphasis added)

Properly construed, the MUTCD not only *does not support* a contention of federal preemption, but actually compels the opposite conclusion.

The federal regulations and the MUTCD contain broad statements best described as guidelines for deciding how to prioritize crossings and qualify for federal funds. Congress never intended these *broad* statements to preempt the entire field of railroad safety. A congressional hearing addressing federal and state roles under the FRSA states:

[t]o avoid a lapse in regulation . . . the states may adopt or continue in force any law, rule, regulation or standard relating to railroad safety until the Secretary has promulgated a specific rule, regulation, or standard covering the subject matter of the state requirement. This prevents the

mere enactment of a broad authorizing Federal statute from preempting the field . . ."¹²

Congress was attempting to prevent the very argument propounded by Petitioner; that the "mere enactment of a broad authorizing Federal statute" preempts the entire field.

Absent a specific federal regulation covering the same "subject matter" of the state requirement, there is no preemption. There is no federal regulation specifically stating under what conditions gate arms should be placed at a particular crossing. Neither do existing federal regulations set forth a federal remedy designed to replace state tort law. Petitioner's construction of the foregoing would leave citizens injured and killed at railroad crossings as a result of negligence by the railroad, the very citizens whom Congress sought to protect, without a remedy.

D. There are no federal laws, rules, regulations or standards relating to grade crossing safety which imply preemption.

i. There is no federal scheme of legislation that occupies the field of grade crossing safety.

If state law is not expressly supplanted it must be clear that Congress intended the federal regulation to exclusively occupy the field before preemption will be implied. *Consolidated Rail v. Smith*, 664 F.Supp. 1228 (N.D. Ind. 1987), citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S.

¹² *Railroad Safety and Hazardous Materials Control: Hearings on H.R. 7068, H.R. 14417, H.R. 14478 and S. 1933*, 91st Cong. 2nd Sess. 51 (1970). See also, *Missouri Pacific Railroad v. Railroad Comm. of Texas*, 850 F.2d 264 (1988). (Emphasis added)

238, 104 S.Ct. 615, 78 L.Ed. 2d 443 (1984). Three of the four Courts of Appeal addressing the question, have found that the FRSA does not occupy the field. *Karl v. Burlington Northern*, 880 F.2d 68 (8th Cir. 1989), *Marshall v. Burlington Northern*, 720 F.2d 1149 (9th Cir. 1983), *East-erwood v. CSX Transportation Inc.*, 933 F.2d 1548 (11th Cir. 1991).

The Secretary was authorized to prescribe rules regulations or standards "supplementing provisions of law and regulations in effect" as of the date of enactment. 45 U.S.C. § 431(a). The regulations found in the C.F.R. addressing prioritization of federally funded projects are not so "comprehensive" as to imply that Congress or the Secretary intended to do more than supplement the existing law. The Secretary was also authorized to expressly preempt state law by "covering the [same] subject matter". In 49 C.F.R. 225.1 which regulates accident/incident reporting requirements, the Secretary exercised the authority to preempt state law. 49 C.F.R. 225.1 provides that: "[i]ssuance of these regulations under the Federal Railroad Safety Act pre-empts States from prescribing accident/incident reporting requirements."¹³ No regulation expressly preempts the subject matter of grade crossing protection. Although preemption can occur regardless of whether the Secretary uses the word "preempt", the absence of preempting language in one area and the presence of preempting language in another should be considered by the Court in determining the Secretary's intent.

¹³ See also § 646.210 expressly preempting state laws requiring railroads from sharing in the cost of federal aid projects.

ii. Georgia's common law duty of care does not conflict with nor stand as an obstacle to federal objectives.

Preemption also exists where the state law conflicts with the federal law to a point where it is impossible to comply with both. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed. 248 (1963). Petitioner can comply with Georgia's duty to erect gate arms at a hazardous crossing and all federal requirements of 49 C.F.R.. Petitioner argues that it is unable to comply with the state duty because the MUTCD gives the ultimate decision of crossing protection to the "public agency with jurisdiction over the crossing". There is no factual or legal support for the contention that the railroad could not improve the Cook Street grade crossing.

Archie Burnham, a Georgia State DOT Traffic and Safety Engineer, testified that the Railroad would occasionally ask for improvements at crossings not on the priority list. The Georgia D.O.T. would approve those installations. (Depo. of Burnham, p.58, l.16-25). Nothing in the federal law prevents such a request. Nothing in the federal law prevents Petitioner from paying the full cost of such improvement should the installment be approved, but federal funds not available.

This is what Justice Kennedy concluded in *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149 (9th Cir. 1983) at 1154 wherein he wrote that "until a federal decision is reached through the local agency on the *adequacy of the warning devices* at the crossing, the Railroad's duty under applicable state law to maintain a 'good and safe' crossing is not preempted". (Emphasis added). Justice Kennedy never held that state common law is preempted if a state declines to use federal funds. *Marshall* held only that

when a federal decision is made on the *adequacy of the warning devices*, is state law preempted. Accordingly, the holding in *Marshall* is not determinative when the decision to erect or not erect gate arms is based on financial constraints.

Marshall does not bar the claim presently before the Court because there has never been a federal decision that the warning device at Cook Street was adequate. In fact, the opposite conclusion was reached. All parties, including the railroad, knew that gate arms were needed at the Cook Street crossing. (Depo. of Burnham, p.44, l.16-25). The Georgia D.O.T. approved gate arms at this crossing and the City of Cartersville agreed that they were needed. Problems arose with the design of the system (Depo. of Burnham, p.60, l.5-14). To accommodate the large truck traffic at the crossing, either islands or a different type of gate arm had to be installed. (Depo. of Burnham, p.60, l.5-14). This required the railroad to raise their communication lines which they did not report back as completed until several years later when yet another fatal accident occurred (Depo. of Burnham, p.61, l.2-6). Due to the sluggishness in the line and difficulties from the railroad side, the project was not moving. (Depo. of Burnham, p.62, l.13-16). Therefore, the Georgia D.O.T., afraid of losing money which had been earmarked for this project, transferred the funds to an active one. (Depo. of Burnham, p.62, l.13-22, p.63, l.20-25). This does not constitute a decision by the Georgia DOT that the crossing protection at Cook Street was adequate. Further, the Railroad not only was not foreclosed from improving this crossing, it was actually encouraged to do so.

Only when a federal decision is made that would preclude a railroad from installing gate arms would the

federal and state laws conflict. Only then would the railroad be put in a position where it could not comply with both laws. A decision by the state based on the absence of funding, as opposed to safety, does not preclude the installation of gate arms through other resources.

The Solicitor General fails to recognize this fundamental principal. The Solicitor would hold that because § 646.214 directs that automatic gates be installed on federal aid projects when the crossing has certain characteristics, once a crossing is updated with federal funds it is adequately protected. This argument is totally unworkable. Georgia is given a certain amount of money each year to improve grade crossings. The decision of whether to install gate arms or automatic lights frequently rests on financial constraints as opposed to what is "adequate".

But this argument misapprehends the scope of Section 646.214. That regulation "covers the subject matter" not of when railroads must use gate arms, but of *how federal funds are to be spent*. CSX recognizes (Br. 21-22 & n.9) that the "subject matter" of a federal regulation is determined by the function it serves. For example, CSX acknowledges that federal safety standards do not "cover the subject matter" of compensation, but only of punishment. Br. 21-22 & n.9. Section 646.214 is designed to ensure that federal funds are spent in a way that advances federal purposes. Nothing in the regulation or its administrative history suggests that the states, by accepting federal funds, agree not to enforce standards of due care that exceed federal requirements. By CSX's own logic, therefore, Section 646.214 only covers the subject matter of how federal funds are spent, and under the plain terms of Section 434 it does not preempt state tort law duties.

Nor does the duty to pay tort damages conflict with the federal goal of promoting safety. *Silkwood v. Kerr-McGee Corp*, 464 U.S. 238, 104 S.Ct. 615, 78 L.Ed. 2d 443 (1984), (holding that the two laws did not conflict because it was not physically impossible to pay both the state damages and the federal fines).

Paying tort damages may use railroad funds that could be used to improve crossing safety. Tort liability, however, does not frustrate Congressional objectives to improve safety, it enhances them. If state tort law is preempted, railroads will have no incentive to improve safety at crossings. The FRSA and the regulations promulgated pursuant thereto recognize this fundamental fact.

II. GEORGIA'S COMMON LAW DUTY OF DUE CARE WHICH REQUIRES A TRAIN TO REDUCE ITS SPEED IN A HAZARDOUS AREA IS NOT PREEMPTED BY THE FEDERAL RAILROAD SAFETY ACT.

Section 434 of the FRSA does not preempt a common law action against a Railroad for negligent failure to reduce its speed. This conclusion is compelled by analysis of the single federal regulation that addresses the speed of trains. 49 C.F.R. 213.9 sets forth maximum speeds that a train can travel depending on the type of train and the track class. Cross-respondent contends that this regulation preempts all state and local speed regulations and insulates them from liability. Cross-respondent concludes that it may travel 60 miles per hour on the track crossing Cook Street in Cartersville, Georgia because it is a class 4 track.

Even though federal and state law both address speed, the analysis does not end here. The question is whether these two requirements cover the *same* "subject

matter". If the two requirements do not cover the *same* "subject matter", the express preemption provision of 45 USC § 434 does not apply. As we are again dealing with the state common law, (a traditional state interest) the intent to preempt must be clear and unmistakable. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984). Cross-petitioner is again entitled to the presumption that her claims are not preempted and Cross-respondent again bears the burden of showing a clear intent by Congress and the Secretary of Transportation to the contrary. The regulation itself and its legislative history clearly demonstrate that the Secretary never intended to preempt the state speed requirements.¹⁴

A. Georgia's common law does not cover the same subject matter as 49 C.F.R. 213.9.

Before it can be determined whether the state and federal law cover the same "subject matter" the state requirement must be defined. At issue in the present case is the duty of a railroad to reduce its speed in a hazardous area to prevent railroad crossing accidents. Also at issue is the duty of a railroad to provide compensation to tort victims. Nothing in 49 C.F.R. 213 covers the subject matter of these state requirements.

The section of the C.F.R. relied on by Respondent is entitled "*Track Safety Standards*" (emphasis added). This section does not address "crossing safety" but in fact states a very limited scope:

¹⁴ As we are dealing with a federal regulation, Respondent's burden is even greater under this Court's decision in *Schneidewind v. ANR Pipeline*, 108 S.Ct. 1145 (1988) holding that regulations normally do not preempt state authority unless they do so with some specificity.

This part prescribes initial *minimum* safety requirements for *railroad track* that is part of the general railroad system of transportation. The requirements prescribed in this part apply to specific *track conditions* existing in isolation. Therefore, a combination of *track conditions*, none of which individually amounts to a deviation from the requirements in this part, may require remedial action to provide for safe operations over that *track*. § 213.1 (emphasis added).

The foregoing demonstrates that the Secretary was addressing conditions pertaining to the *track* itself. The foregoing also demonstrates recognition by the Secretary that the requirements of the section do not necessarily make operations safe. Section 213 shows a clear intent to regulate only the safety of the *track and the rails*. Nothing in § 213 regulates safe operations over grade crossings, through municipalities, or in the face of hazardous conditions. Nothing in § 213 addresses safe operations in dangerous weather conditions, safe operations in heavily populated areas, or safe operations through areas with hazardous grade crossings. This regulation merely provides a *maximum* speed based on factors such as the track geometry, (§ 213.51) track structure, (§ 213.101), the number and quality of crossties (§ 231.109) and the proper maintenance for a defective rail (§ 213.212). Other sections address track appliances and track related devices (§ 213.201) and require periodic inspections (§ 213.231). The condition of the track gives rise to the track classification. The track classification gives rise to the maximum allowable speed. (§ 213.9). A reading of this section clearly demonstrates that the Secretary was addressing how fast a train can travel and not derail. This conclusion is supported by two lower court decisions. See *Sisk v. National Railroad Passenger Corp.*, 647 F.Supp. 861 (Kan. 1986), *Southern Pacific Transportation Co. v. Maga*

Trucking Co., 758 F.Supp. 608 (D.C. Nev.1991) (holding that § 213 was for the safety of *trains*). It is also supported by legislative history.

i. In adopting 49 C.F.R. 213 the Secretary was addressing the safety of trains and the hazards of derailment.

Senate Report 91-619 discussed the intended scope of the FRSA. An understanding of the Congressional concerns is essential to an understanding of the Secretary's actions. Senate members discussed the accidents prompting the FRSA and prompting the authorization of the Secretary's regulatory power. The lack of minimum standards governing the railroads caused numerous railroad employee injuries and deaths. The use of railroads in transporting hazardous materials posed a new danger in the case of derailments.

The basic thrust of the testimony in a voluminous hearing record is that the unsafe conditions which persist on some railroads are very serious, particularly in view of the fact that with the introduction of higher speed, longer and heavier trains, the increased carriage of deadly and dangerous materials, the possibility of a major catastrophe is ever present.

Railroads today, as well as other carriers, are transporting extremely flammable explosives, highly reactive and poisonous substances throughout the Nation's metropolitan areas and countrysides.

Increased accidents, greater speeds, and more hazardous shipments provide an extremely lethal combination so that with increased frequency, train wrecks threaten whole communities with flame explosions, and contamination by poisonous chemicals. (Senate Report: 91-619)

The report went further to cite a number of recent derailment accidents. The report cited a case where one car derailed in a 98 car train triggering a general derailment of an oncoming passenger train which resulted in spillage of poisonous cargo, a resulting 10 hour fire that destroyed a cannery (the city's major industry) and the destruction of seven homes. The entire town was evacuated for two days and the town's water supply was polluted with cyanide for two months after the accident. The report cited "inadequate track maintenance which left [a] joint unsupported" as the cause for the broken rail that prompted the derailment. Senate members noted that a \$50.00 repair could have prevented this catastrophe.

Members cited several other derailment accidents noting that between August, 1964 and May, 1969 thirty-nine communities were evacuated as a result of derailments of trains carrying poisonous cargo. The Senate recognized that two-thirds of all railroad accidents are derailments. These derailments "are largely attributable to *track* and equipment problems" (emphasis added). The Senate noted an absence of federal regulations covering the track and roadbed.

Section 213 regulates a perceived cause of derailments, the *track conditions*. Section 214 sets forth rules for how fast a train can travel across a certain *quality* track to prevent a possible derailment. The Secretary did not intend these speed regulations to govern the speed of a train at a grade crossing. Supporting this contention is a section of the Secretary's 1972 Report to Congress subheaded *Railroad Operating Costs* where the Secretary addressed the value of entirely eliminating some grade crossings:

Railroad Operating Costs - The Association of American Railroads provided data from one major railroad company showing the cost and time involved in decelerating and accelerating

trains. The costs include additional fuel consumed and repair costs allocated to fuel costs, as well as brake and wheel wear costs. The Association also provided information from three other major railroad companies regarding both the number and magnitude of speed changes required because of speed restrictions imposed on railroad operations by municipal ordinances or other governmental regulation for tracks crossing streets and highways at grade. It is assumed that these restrictions would be removed in each area where all grade crossings along a given rail line were eliminated. Expanding this limited data by using a gross ton-mile factor, indicates an estimated operating and delay cost to railroad companies of as much as \$75 to \$100 million per year for decelerating and accelerating trains through urban areas where speeds are restricted by local ordinance or other regulation. *Report to Congress: Railroad Highway Safety Part II: Recommendations for Resolving the Problem*. p.38 (August, 1972). (Emphasis added).

The Secretary recognized in this report that local ordinances and other state speed restrictions would remain in effect where appropriate, including at grade crossings. If grade crossings were completely eliminated, speed reductions necessitated by grade crossings would be eliminated as well. The duty to regulate speed so as not to operate a train in a negligent manner would not be eliminated.

Cross-respondent argues that § 213 reflects the Secretary's determination to preempt state tort law, so that the railroad would not be negligent as a matter of law as long as its speed did not exceed 60 mph on a class 4 track. This construction is bizarre and insupportable. It converts a regulation addressing track quality and train speed and aimed at controlling derailments into a grant of immunity

from liability for negligent or even reckless operation of the railroad.

Section 213 does not insulate the railroad from liability when it recklessly fails to reduce speed in the face of hazardous conditions. Does the railroad have no duty to slow down when it knows a stalled gasoline tank truck is blocking a crossing? May a locomotive travel at 60 mph regardless of dense fog and pouring rain over multiple grade crossings and through the heart of a large city? Would a regulation so providing promote safety and reduce accidents?

Section 213 regulates track quality and concomitant speed. It is directed at preventing derailments and the injuries they cause to railroad employees and to the public. It does not and could not reasonably establish a national minimum "safe" speed.

- ii. Since the Secretary was not addressing the same "safety concerns" as the state requirement, the same "subject matter" is not covered.

A federal regulation addresses the "same subject matter" of a state requirement *only* if both regulations address the same safety concerns. *Burlington Northern Railroad Co. v. Minnesota*, 882 F.2d 1349 (8th Cir. 1989), *Southern Pacific Transportation Co. v. Public Utilities Comm'n*, 647 F.Supp. 1220 (N.D. Cal. 1986). Because the State requirement to reduce speed in a hazardous area does not address the same safety concerns as the Secretary in § 213, the FRSA's express preemption provision is not triggered. Because this is an express preemption case, the Court's inquiry should "begin and end with the statutory framework itself" *Gade v. National Solid Wastes Management Ass'n*, ___ U.S. ___, 112 S.Ct. 2374, ___ L.Ed.2d

— (1992) (quote from dissent at p.2390). But even if this Court goes further to address whether preemption is implied, the state tort law duties at issue are not preempted.

B. 49 C.F.R. 213 does not imply preemption.

Section 213 sets forth *minimum safety requirements*. No federal regulation sets forth mandatory speed regulations. No federal regulation provides compensation to victims of the railroad's failure to reduce its speed in hazardous areas. Nor does any federal regulation approve a minimum or a maximum train speed based on factors such as of the number of grade crossings, the population of the area or the physical relationship between the railroad line and the city through which it passes. In short, no comprehensive scheme of federal regulation of train speed exists.

Georgia's duty of care which requires simply that the railroad not be negligent in regulating speed of trains does not conflict with nor stand as an obstacle to the objectives of Congress. The traditional test of whether state and federal law conflict, is whether or not it would be impossible to comply with both. *Florida Lime and Avocado Growers v. Paul*, 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed. 248 (1963).

Florida Lime held that the test of whether a state standard must give way to a federal regulation is "whether both regulations can be enforced without impairing the federal superintendence of the field". *Id.* at 142. In *Florida Lime*, a California statute gauged the maturity of avocados by oil content, requiring no less than 8 percent oil in any avocado for sale in California. A federal marketing order gauged the maturity of an avocado by a standard unrelated to oil content. The avocado growers

challenged the state requirement under federal preemption. This Court noted that the statutes were different but held that there must be an actual conflict before the State law will be preempted. The test set forth by this Court in *Florida Lime* is whether compliance with both laws would be physically impossible. This Court provided an example of preemption noting an actual conflict if the Federal order forbade the picking of an avocado of more than 7% oil and the California Statute excluded from state sale any avocado with less than 8% oil.

In the present case, the Secretary of Transportation has adopted a rule which allows a train to travel no more than 60 miles per hour on a class 4 track. The State common-law requires that a train reduce its speed when a reasonable man would do so. There is no conflict between these two standards. Trains can easily comply with both the federal and the state standards. If Georgia were to require trains to travel *no slower than* 70 miles per hour through its borders, and federal law set a maximum speed of 60, the railroad could not comply with both and preemption would be implied.

Cross-respondent argues that the state law duty conflicts with the federal standard for several reasons. Cross-respondent argues that the Secretary has determined that slower train speeds do not prevent accidents at grade crossings and so the Secretary chose to address protection of motorists through grade crossing protection instead. If every crossing in Georgia had the protection it needs, the railroad's argument might have merit. Considering however that the protection of crossings is limited to the available federal funds and limited also to "public crossings" the Secretary could not possibly address the safety of all crossings in this way. The purpose of the FRSA is to

"reduce deaths and injuries" as well as "reduce accidents" at railroad crossings. Slower train speeds will promote this goal.¹⁵ Both Cross-respondent and the Solicitor General argue also that emergency braking will be counter to the purpose of § 213 because of the increased chance of derailment. Slowing down in a hazardous area does not require an emergency braking procedure however.¹⁶

Courts have held that these two requirements are not incompatible. *Florida East Coast Railway v. Griffin*, 566 So.2d 1321 (Fla. App. 1990); *Sisk v. National Railroad Passenger Corp.*, 647 F.Supp. 861 (Kan. 1986); *Carson v. Burlington Northern Railroad*, No. 89-O-513 (D.C. Neb. 7-5-90 unpublished). These courts found the speed limits set by the Secretary to be maximum limits only, not necessarily a speed that is safe. There is nothing in the federal law or federal regulations which requires a railroad to travel at the maximum limit. Therefore, there is no reason why the

¹⁵ In the reports to Congress, the Secretary noted that "the average number of fatalities per crossing accident is increasing". . . . "Several factors may be contributors to this trend . . . an example is higher average train speeds" (April, 1989, p.2-10). "Train speeds for fatal accidents are markedly higher than for all accidents, 70 percent" (*Id.* at 6-9) "Danger . . . increases with higher train speeds because both the pedestrians and the engine-men have less warning time of the other's presence. Also, the severity of an accident involving a high-speed train can be expected to be greater" (Nov. 1971, p.95)

¹⁶ It is worth pointing out that Cross-respondent must slow down repeatedly anyway because of track conditions and other factors. The CSX Atlanta-Division Timetable, contained in the Record, demonstrates at p.5-7 that Cross-respondent is continually required to observe varying speed restrictions for reasons having nothing to do with local ordinances.

Railroad cannot physically comply with both requirements.

C. Lower Court decisions finding preemption of municipal ordinances have erroneously construed and misapplied the law.

Several Courts addressing the question of whether a municipal train speed ordinance is preempted under § 213 have ruled that these ordinances are preempted.¹⁷ In almost every case, the Court found preemption of the municipal speed ordinance because the speed requirement had not been mandated at the state level. This question is not presently before the Court but in light of this Court's decision in *Wisconsin Public Intervenor v. Mortier*, ___ U.S. ___, 111 S.Ct. 2476, ___ L.Ed. 2d ___ (1991) it is doubtful that this reasoning will continue to be accepted.¹⁸

These cases blindly followed the first appellate decision on the question. *Donelon v. New Orleans Terminal Co.*,

¹⁷ See *Mahony v. CSX Transportation Inc.*, ___ F.Supp. ___, (11th Cir. 7/20/92, No. 90-9052), *Sisk v. National Railroad Passenger Corp.*, 647 F.Supp. 861 (D.C. Kan. 1986), *CSX v. City of Tullahoma*, 705 F.Supp. 385 (E.D. Tn. 1988), *Consolidated Rail Corp. v. Smith*, 664 F.Supp. 1228 (D.C. Ind. 1987), *City of Covington v. Chesapeake & Ohio Railway*, 708 F.Supp. 806 (D.C. Ky. 1989), *Southern Pacific Transportation v. Town of Baldwin*, 685 F.Supp. 601 (D.C. La. 1987), *Chesapeake & Ohio Railway v. City of Bridgeman*, 669 F.Supp. 823 (W.D. Mich. 1987), *Smith v. Norfolk & Western Railway*, 776 F.Supp. 1335 (N.D. Ind. 1991).

¹⁸ In *Mortier*, this Court held that an affirmative grant of regulatory authority to States could not generally be read to exclude similar authority in local political subdivisions. This Court explained that local political subdivisions are "components of the very entity the statute empowers."

474 F.2d 1108 (5th Cir. 1973). In *Donelon* the Court correctly found express preemption as the state and federal requirements covered the same subject matter. In *Donelon*, the Louisiana Parish officials concerned over two derailments in a thirty day period, passed a resolution to require the railroad to correct dangerous conditions of the tracks and the roadbeds. The 5th Circuit Court found the actions of the parish preempted by the FRSA. The Circuit Court however, based its decision on the requirement not having been passed at the state level, concluding that the "local safety hazard" exception of the FRSA was not applicable. The Court in *Donelon* was correct that the Parish's regulations were expressly preempted. The Parish in that case, was addressing the same safety hazard as the Secretary. Both regulations were concerned over derailments and both regulations attempted to regulate the tracks themselves. This decision and its reasoning prompted the line of decisions finding preemption of the municipal speed ordinances because they were not passed at a state level.

Not all Courts have followed this line of decisions. See *Runkle v. Burlington Northern*, 613 P.2d 982 (Mont. 1980), *Carson v. Burlington Northern Railroad Co.*, No. 89-0-513 (D.C. Neb. 7/5/90 unpublished) and *Florida East Coast Railway v. Griffin*, 566 So.2d 1321 (Fla. App. 4th Dist. 1990). These courts have refused to take the question of the railroad's negligence away from the jury, finding that the federal speed limits are "neither safe nor mandatory". *Carson*. As stated by the Court in *Florida East Coast*:

We reject the appellant's contention that the federal act has preempted consideration of negligent conduct of a railroad and its agents when faced with a dangerous condition or event, notwithstanding that the acts of negligence involve

a failure to reduce speed below the maximum limit established by federal law.

III. GEORGIA LAW IS NOT PREEMPTED BY FEDERAL LAW OR FEDERAL REGULATIONS WHERE GEORGIA ADDRESSES A "LOCAL SAFETY HAZARD".

In addition to allowing state regulation to continue until the Secretary of transportation has adopted a rule on the same subject matter, Congress expressly invited state regulation in certain circumstances. Under these circumstances the states may regulate even if federal law covers the same subject matter.

... A state may adopt or continue in force an additional or more stringent law, rule, regulation, order or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order or standard and when not creating an undue burden on interstate commerce. 45 U.S.C. § 434

Determining whether the two common-law duties at issue fall under the "local safety hazard" exception requires deciding three distinct elements: first, whether a heavily traveled grade crossing in a municipality constitutes a "local safety hazard"; second, whether the requirements that a railroad place gate arms at a dangerous crossing and reduce its speed in a hazardous area are incompatible with a federal rule on the same subject matter; and third, whether these two requirements place an undue burden on interstate commerce.

A. The dangerous grade crossing at Cook Street in Cartersville, Georgia presents a "local safety hazard".

Congress believed that the "Secretary of Transportation should have general authority over all areas of railroad safety", Senate report 91-619. Congress however was also concerned with areas not susceptible to federal regulation. In discussing the Secretary's regulatory authority, Congress showed a clear concern that it not excessively limit the role of the States.

Testimony presented before the committee, as well as experience with other safety laws which have national application seem to lead to the conclusion that the States should have a role in the total safety effort. In particular, the States ought to be able to impose regulations relating to local hazards so long as the regulations do not unnecessarily burden interstate commerce and are not inconsistent with Federal regulations. Senate report 91-619.

This concern lead to the "local safety hazard" exception in § 434. A "local safety hazard" is defined as an area where the hazard is not statewide in nature and not capable of being regulated by national standards. *Union Pacific Railroad Co. v. Public Utility Commission of Oregon*, 723 F.Supp. 526 (1989). The Secretary has not passed any regulation which would define those crossings in need of gate arms nor any speed requirement in areas posing certain hazards to the motoring public. These hazards are not capable of being properly regulated by national standards.

Considering the variety of topography and geography of states across the nation, the differences in the size of towns, the difference in the towns' relationship to the railroad, it is self-evident that not all areas of track pose the same safety hazards. Because of these differences,

these hazards are particularly susceptible to a common-law duty of care standard. A common-law duty of care is applicable statewide but requires something different at each crossing. A common-law duty requires different things at different times of the day. This duty of care takes into consideration the time of day, the weather conditions, the frequency of vehicle or truck traffic across different grade crossings, and the adequacy of the protection at the grade crossings in the area. Because of these varying conditions, States deal with the speed of a train in the same way that they deal with the speed of any other vehicle. The state imposes upon the operator a speed which is reasonable and safe under all of the then existing conditions.

B. Georgia's common-law duties to reduce speed and erect gate arms at a hazardous crossing does not create an undue burden on interstate commerce.

The state and federal laws at issue are "not incompatible". The state and federal laws can easily co-exist as Petitioner can easily comply with both laws. This was recognized by the court in *Sisk v. National Railroad Passenger Corp.*, 647 F.Supp. 861, 863 (1986). And the state requirements that the Railroad place gate arms at a dangerous crossing and reduce its speed in this hazardous area do not impose an undue burden on interstate commerce.

In cases finding an undue burden on interstate commerce, the regulations sought to regulate the train itself. Courts have correctly found that requiring cabooses and certain safety equipment on trains would impose too high a burden on the railroad company by requiring them to stop at every state line and change their equipment.

Missouri Pacific Railroad v. Railroad Commission of Texas, 850 F.2d 264, 268 (6th Cir. 1988), See also *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945). Petitioner recognizes that federal law preempts virtually all regulations affecting the physical conditions of the train itself. But the common-law duties to install gate arms at hazardous crossings and to reduce speed in the face of dangerous conditions do not effect the structure of the train itself. Nor do they require the train to stop at the state line and change equipment or otherwise burden the train's ability to travel across state lines. They simply impose on the railroad the same duty that is placed on every other citizen or industry — the duty to refrain from negligently injuring others.

CONCLUSION

For all of the above and foregoing reasons the judgment of the Eleventh Circuit Court of Appeals that the railroad's duty to maintain a safe crossing has not been preempted by the Federal Railroad Safety Act should be affirmed. The finding of preemption made by the Court below regarding the absence of a duty to travel at a reasonably safe speed should be reversed.

Respectfully Submitted,

TAMBRA PANNELL COLSTON
JAMES I. PARKER *
WILLIAM L. LUNDY
PARKER AND LUNDY
P.O. Box 1018
Cedartown, Georgia 30125
706-748-5643

* Counsel of Record

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1992

CSX TRANSPORTATION, INC.,
v. *Petitioner,*

LIZZIE BEATRICE EASTERWOOD,
Respondent.

LIZZIE BEATRICE EASTERWOOD,
v. *Cross-Petitioner,*

CSX TRANSPORTATION, INC.,
Cross-Respondent.

On Writs of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

**REPLY BRIEF FOR PETITIONER IN NO. 91-790
AND CROSS-RESPONDENT IN NO. 91-1206**

JACK H. SENTERFITT *

RICHARD T. FULTON

JAMES W. HAGAN

ALSTON & BIRD

1201 West Peachtree

Atlanta, Georgia 30309-3424

(404) 881-7000

HOWARD J. TRIENENS

CARTER G. PHILLIPS

MARK E. HADDAD

LAURA V. FARTHING

SIDLEY & AUSTIN

1722 Eye Street, N.W.

Washington, D.C. 20006

(202) 736-8000

Counsel for Petitioner in No. 91-790

Counsel for Cross-Respondent in No. 91-1206

November 16, 1992

* Counsel of Record

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
I. RESPONDENT AND HER <i>AMICI</i> OVER- STATE CSXT'S CLAIM OF PRE-EMPTION AND IGNORE THE SECRETARY'S ALLO- CATION OF RESPONSIBILITY FOR GRADE CROSSING SAFETY	1
II. RESPONDENT AND HER <i>AMICI</i> UNDER- STATE THE PRE-EMPTIVE SCOPE OF SECTION 434	6
A. The Purpose of Section 434 Was To Pre-empt, Not Preserve, State Law	6
B. The Presumption Against Pre-emption Is Inapplicable To Section 434	8
C. The Secretary's Intent Is Irrelevant And The Solicitor General's Views Are Entitled To No Deference	9
III. UNDER SECTION 434, THE SECRETARY'S REGULATIONS PRE-EMPT RESPONDENT'S GRADE CROSSING CLAIM	10
A. The Secretary's Regulations At 23 C.F.R. Parts 924 And 1204.4 Cover The Subject Matter Of Determining When Public Grade Crossings Need Additional Traffic Control Devices And Designing And Implementing Plans To Install Those Devices	11
B. The Secretary's Traffic Control Standards Set Forth In The MUTCD Also Cover The Subject Matter	15
C. Respondent's Claim Also Is Pre-empted By The Secretary's Regulations In Part 646.....	17
D. Respondent's Claim Is Pre-empted Under <i>Marshall</i>	21

TABLE OF CONTENTS—Continued

	Page
IV. RESPONDENT'S TRAIN SPEED CLAIM IS ALSO PRE-EMPTED	23
V. SECTION 434'S EXCEPTION FOR ESSEN- TIALY LOCAL SAFETY HAZARDS DOES NOT APPLY TO THE CLAIMS IN THIS CASE	24
CONCLUSION	25

TABLE OF AUTHORITIES

CASES	Page
<i>Aloha Airlines, Inc. v. Director of Taxation</i> , 464 U.S. 7 (1983)	8
<i>Armijo v. Atchison, T. & S.F. Ry.</i> , 754 F. Supp. 1526 (D.N.M. 1990), <i>appeal docketed</i> , Nos. 91- 2084, 91-2088 (10th Cir. 1991)	4, 24
<i>Bowen v. Georgetown Univ. Hosp.</i> , 488 U.S. 204 (1988)	10
<i>Cipollone v. Liggett Group, Inc.</i> , 112 S. Ct. 2608 (1992)	4, 8
<i>Crane v. Cedar Rapids & Iowa City Ry.</i> , 395 U.S. 164 (1969)	3
<i>Exxon Corp. v. Hunt</i> , 475 U.S. 355 (1986)	8, 10
<i>FMC Corp. v. Holliday</i> , 111 S. Ct. 403 (1990)	9
<i>Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta</i> , 458 U.S. 141 (1982)	9
<i>Georgia R.R. & Banking Co. v. Cook</i> , 95 S.E.2d 703 (1956)	3
<i>Hatfield v. Burlington N. R.R.</i> , 958 F.2d 320 (10th Cir. 1992), <i>petition for cert. filed</i> , 61 U.S.L.W. 3016 (U.S. June 8, 1992) (No. 91-1977)	16
<i>Hillsborough County v. Automated Medical Lab., Inc.</i> , 471 U.S. 707 (1985)	9
<i>Investment Co. Inst. v. Camp</i> , 401 U.S. 617 (1971)	10
<i>Marshall v. Burlington N., Inc.</i> , 720 F.2d 1149 (9th Cir. 1983)	11, 16, 21, 22
<i>Morales v. Trans World Airlines, Inc.</i> , 112 S. Ct. 2031 (1992)	9
<i>New York v. United States</i> , 112 S. Ct. 2408 (1992)	17
<i>Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.</i> , 469 U.S. 189 (1985)	9
<i>Perez v. Campbell</i> , 402 U.S. 637 (1971)	23
<i>Rice v. Santa Fe Elevator Corp.</i> , 331 U.S. 218 (1947)	8
<i>South Dakota v. Dole</i> , 483 U.S. 203 (1987)	17

STATUTES AND REGULATIONS

Federal-Aid Highway Act of 1944, ch. 626, 58 Stat.
838 (codified as amended at sections of 23
U.S.C.)

TABLE OF AUTHORITIES—Continued

	Page
23 U.S.C. § 130	17
§ 130(d)	5, 11, 25
§ 409	4, 20
Federal Railroad Safety Act, Pub. L. No. 91-548, 84 Stat. 971 (1970) (codified as amended at 45 U.S.C. § 421 <i>et seq.</i>)	
45 U.S.C. § 431 (a)	7
§ 433	7
§ 434	<i>passim</i>
Ga. Code Ann. § 51-1-2 (1991)	25
Ga. Code Ann. § 46-8-190 (1992)	3, 25
23 C.F.R. § 646.214 (1991)	13
§ 646.214 (b)	18
§ 646.214 (b) (2)	18, 20
§ 646.214 (b) (3) (i)	18
§ 655.601 (a)	15
Part 924	11, 18
§ 924.9	2, 11
§ 924.9 (a) (4)	12, 18
§ 924.9 (a) (4) (iii)	25
§ 924.9 (a) (4) (v)	13, 25
§ 924.11	11, 12
Part 1204.4	11, 18
§ 1204.4 No. 12	11
§ 1204.4 No. 13	11
49 C.F.R. § 213.9 (1991)	3
§ 213.37	3
Part 234	3, 14
§ 236.501-236.505	3
44 Fed. Reg. 11544 (1979)	14
LEGISLATIVE MATERIALS	
116 Cong. Rec. 27611 (1970)	7
116 Cong. Rec. 27612 (1970)	7, 24
116 Cong. Rec. 27613 (1970)	7
Amtrak Safety, Hearing Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce, Science and Transportation, 98th Cong., 2d Sess. (1984)	5

TABLE OF AUTHORITIES—Continued

	Page
H.R. Rep. No. 1194, 91st Cong., 2d Sess., <i>reprinted</i> <i>in</i> 1970 U.S.C.C.A.N. 4104	24, 25
Hearings Before the Subcomm. on Transportation and Aeronautics of the Comm. on Interstate and Foreign Commerce on H.R. 7068, H.R. 11417, H.R. 14478 and S. 1993, 91st Cong., 2d Sess. (1970)	7, 24
Hearings on H.R. 16980 Before the House Comm. on Interstate and Foreign Commerce, 90th Cong., 2d Sess. (1968)	7
S. Rep. No. 619, 91st Cong., 1st Sess. (1969)	7
OTHER AUTHORITIES	
Report of the Secretary of Transportation to the United States Congress, The 1992 Annual Re- port on Highway Safety Improvement Programs (April 1992) (No. FHWA-SA-92-013)	6
U.S. DOT, Manual on Uniform Traffic Control De- vices (1988) (No. FHWA-SA-89-006)	<i>passim</i>
U.S. DOT, Railroad-Highway Grade Crossing Handbook (2d ed. 1986) (No. FHWA-TS-86- 215)	14
U.S. DOT, Rail-Highway Crossings Study (1989) (No. FHWA-SA-89-001)	5, 12, 14, 19
U.S. DOT, Traffic Control Devices Handbook (1983)	<i>passim</i>

**REPLY BRIEF FOR PETITIONER IN NO. 91-790
AND CROSS-RESPONDENT IN NO. 91-1206**

Respondent's and *amici*'s arguments against pre-emption mischaracterize the nature of the pre-emption claim advanced by CSX Transportation, Inc. ("CSXT") and misconstrue Section 434 of the Federal Rail Safety Act ("FRSA" or the "Act"). Railroads are and will continue to be liable in tort for negligent failure to meet their federally imposed duties and their state law duties not otherwise covered by federal regulation. But railroads may not be held liable in tort for failing to carry out the two duties at issue here. The Secretary's regulations cover these subjects by assigning exclusive responsibility to public authorities for selection of appropriate grade crossing devices and for determination of safe train speeds.

**I. RESPONDENT AND HER *AMICI* OVERSTATE
CSXT'S CLAIM OF PRE-EMPTION AND IGNORE
THE SECRETARY'S ALLOCATION OF RESPONSIBILITY
FOR GRADE CROSSING SAFETY.**

In its opening brief, CSXT argued that two very specific prior tort duties of railroads, *viz.*, to determine what traffic control signals are needed at grade crossings and what train speeds are safe, have been pre-empted, pursuant to Section 434, by federal regulations that cover those very subject matters. At the same time, CSXT affirmatively stated that Section 434 did not pre-empt other railroad tort liability for negligence in carrying out its safety responsibilities at grade crossings. CSXT Br. 21-22, 21 n.9, 26 n.12. However this Court rules on the two specific duties at issue, this case will go back to the district court for trial on other admittedly non-pre-empted tort claims of respondent. Pet. App. 13a-18a.

Respondent and her *amici* assert, however, that what CSXT is seeking is pre-emption of *all* state tort law

remedies for railroad negligence at grade crossings.¹ Most of respondent's and *amici*'s responses turn, not only rhetorically but substantively, on this mischaracterization of CSXT's argument. Thus, respondent argues that "Congress never intended . . . to pre-empt the entire field of railroad safety." Resp. Br. 29. Respondent and the Solicitor General also cite excerpts of reports of the Secretary of Transportation which assume ongoing railroad tort liability. *Id.* at 14-17; S.G. Br. 21. Respondent and *amici* point out that the Secretary's "net benefit" calculus assumes that railroads continue to be liable in tort. *E.g.*, Resp. Br. at 14-17.

Respondent and *amici* attack a straw man. CSXT has never argued that Section 434 pre-empts all railroad tort liability at rail-highway crossings. Railroads remain liable for negligence in carrying out the responsibilities for grade crossing safety that the Secretary has assigned to them. Railroads are not liable, however, for responsibilities that the Department of Transportation has taken upon itself to regulate (determining what train speed is safe) or has assigned exclusively to the states (determining the need for and selection of traffic control devices).

Pre-empting these duties does not eliminate tort liability for negligence at grade crossings. Railroads remain responsible in tort for injuries caused by their negligent failure to meet their federal safety responsibilities as well as their remaining non-pre-empted state law responsibilities. Under federal law, railroads have a duty, *inter alia*, to participate in the federally mandated state process for evaluating and selecting traffic control devices (23 C.F.R. Part 924 (1991); Manual on Uniform Traffic Control Devices (1988) ("MUTCD") Part VIII), to keep

¹ See, e.g., Resp. Br. 8 (CSXT interprets Section 434 as "absolving the railroad of liability in tort"); *id.* at 30 (the "argument propounded by petitioner" is that Section 434 "pre-empts the entire field"); S.G. Br. 24 (nothing in federal regulations "provides a basis for concluding that railroads are relieved from their duty of care in all circumstances"). See also Railway Labor Executives Br. 4; American Trial Lawyers Association ("ATLA") Br. 2, 9, 10, 11, 21.

such devices in proper working order (49 C.F.R. Part 234 (1991)), to trim vegetation along their tracks to ensure proper visibility (*id.* at § 213.37), and to travel within federally imposed speed limits (*id.* at §§ 213.9, 236.501-.505).² Under state law, railroads have a duty, *inter alia*, to have the engineer blow the train's whistle before entering a crossing, maintain a constant and vigilant lookout along the track, and attempt to stop or slow the train if possible to avoid a collision. *E.g.*, Ga. Code Ann. § 46-8-190 (1992); *Georgia R.R. & Banking Co. v. Cook*, 95 S.E.2d 703 (1956). If a railroad negligently fails to meet these state or federal safety responsibilities and thereby causes injury, no federal law pre-empts the injured party from seeking compensation from the railroad under state tort law. Here, for example, respondent complains that CSXT allowed vegetation along the tracks to impair visibility at the crossing and that the flashing lights at the crossing malfunctioned. Resp. Br. 2. Such claims are not pre-empted by Section 434, and at least the vegetation claim is available for trial regardless of this Court's decision.³

Similarly, states also can be liable for their failure to meet the responsibilities that the Secretary has assigned to them, particularly, "determination of need [for] and selection of devices at a grade crossing." MUTCD 8A-1. The Secretary has acknowledged that tort liability is a real concern for the states, because sovereign immunity "survives in less than a third of the States."⁴

² Railroads are liable for damages under state tort law for injuries caused by the violation of federal regulations. *Crane v. Cedar Rapids & Iowa City Ry.*, 395 U.S. 164, 166 (1969) (where federal statute provides no cause of action for "damages from injuries resulting from a railroad's violation of the Act," the injured party may bring "a common-law action in tort" for those damages).

³ The complaint does not allege that the flashing lights malfunctioned. See J.A. 4-5 ¶ 8. Neither the court of appeals nor the district court identified malfunctioning lights as one of respondent's claims. See Pet. App. 17a-18a, 24a.

⁴ See, e.g., U.S. DOT, Traffic Control Devices Handbook 1-15 (1983) ("MUTCD Handbook"); see also *id.* at 1-20 (citing 1980

Unlike *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992), where the plurality decided which tort claims had been pre-empted and which had not, here the Secretary's assignment of responsibilities means that the Secretary effectively has decided which tort claims have been pre-empted and which have not. And unlike the situation in *Cipollone* where pre-emption of the manufacturer's tort liability meant that plaintiffs had no recourse in damages, here the Secretary's assignment of the responsibilities for grade crossing protection does not preclude tort actions against the responsible public authorities.⁵

CSXT's position is thus consistent with statements of the Secretary that public and private actors, including railroads, share "joint responsibility" for railroad safety. MUTCD 8A-1; See Resp. Br. 6, 14-16; S.G. Br. 17, 21. This case simply does not present the Court with a choice between pre-empting all or no railroad tort liability. Congress did not eliminate all tort liability, the Secretary's regulations have not eliminated it, and CSXT does not seek such relief. CSXT seeks only to have the plain

survey estimating "8,000 pending tort claims totaling over \$3 billion" against state highway agencies); *Armijo v. Atchison, T. & S.F. Ry.*, 754 F. Supp. 1526, 1533 (D.N.M. 1990) (pre-emption of claim against railroad that crossing required additional signals would not deny plaintiff "access to the courts or a right of recovery" because State "would probably not enjoy sovereign immunity" against such a claim), *appeal docketed*, Nos. 91-2084, 91-2088 (10th Cir. 1991).

In further recognition of state liability, the Secretary proposed legislation, enacted and codified at 23 U.S.C. § 409, forbidding use of state highway department documents in any action for damages. See Br. for U.S. in *Alabama Highway Dep't v. Boone*, No. 90-1412 at 9-10 (1991). These documents were protected because of the concern that allowing their discovery would deter states from "compil[ing] complete and accurate information" about grade crossing hazards and thereby "jeopardize the effectiveness of federal programs intended to promote highway safety . . ." *Id.* at 12, 15.

⁵ To the extent recourse against the states is limited by sovereign immunity, that is a function of the states' refusal to be responsible for damages, and is not attributable to Section 424.

meaning of Section 434 applied precisely the way Congress intended it to apply: to pre-empt the imposition upon railroads, through state tort law, of duties that the Secretary has placed on other parties.

The straightforward application of Section 434 leads to improved safety at grade crossings.⁶ Railroads continue to be liable for failing to meet the substantial responsibilities that federal and state law impose, including participating responsibly in the joint public/private Rail-Highway Crossing Program (23 U.S.C. § 130(d)) and maintaining active control devices and other physical aspects of a crossing in good condition. Railroads also have an enormous economic incentive, quite apart from this threat of tort liability, to avoid crossing accidents by investing in crossing safety.⁷

⁶ Respondent and amici wrongly assert that railroad negligence and a lack of active warning devices are responsible for the roughly 550 fatal accidents that still occur annually at grade crossings. *E.g.*, American Bus Ass'n et al. Br. 7. The Secretary has found that "more than half of all rail-highway crossing accidents are the result of a motorist driving around lowered gates or proceeding through flashing red lights without stopping" (U.S. DOT, Rail-Highway Crossings Study 4-20 (1989) ("DOT Study")), and that "[n]early all grade crossing accidents involve some degree of driver error." MUTCD Handbook 8-79. The Secretary also has rejected the idea that active devices are needed at every crossing: "Today, however, most of the high-risk crossings have been improved, and many of the crossing accidents are occurring at low volume crossings where the installation of flashing light signals and gates usually cannot be justified." DOT Study at 4-15.

⁷ See, *e.g.*, Amtrak Safety, Hearing Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce, Science, and Transportation, 98th Cong., 2d Sess. 56-57 (1984) (testimony of W. G. Claytor) ("The motivation not to have a derailment on your railroad, in addition to being very dangerous, is that it is very expensive for you. Even if you don't pay all the passenger costs, you disrupt the road, you have a lot of expenses, your traffic is wrecked, and everything else. So the motivation not to have a train wreck, if you are running a decent railroad, is pretty great whether or not the expenses of a particular thing are higher or lower").

What the recognition of pre-emption does is to allow the federally mandated grade crossing program to work efficiently. Without pre-emption, railroads would shift their resources to crossings that on any objective measure are not hazardous but that present a higher risk of tort liability, particularly for punitive damages, such as crossings where an accident recently occurred. By reinforcing the rational, forward-looking, priority-based scheme of crossing evaluation and improvement that Congress mandated, pre-emption of duplicative responsibilities contributes to the rail progress that FRSA has made in improving grade crossing safety.⁸

II. RESPONDENT AND HER *AMICI* UNDERSTATE THE PRE-EMPTIVE SCOPE OF SECTION 434.

A. The Purpose Of Section 434 Was To Pre-empt, Not Preserve, State Law.

Respondent and her *amici* not only overstate the scope of CSXT's position on pre-emption, they understate the pre-emptive effect of Section 434. Respondent argues that "Congress intended [Section 434] to broadly preserve the authority of the states" to regulate rail safety. Resp. Br. 3; see State & Local Legal Center Br. at 8-9 & n.3 (Congress intended Section 434 to be "an affirmation of state authority").

This interpretation of Section 434 cannot be reconciled with the express language, structure and history of FRSA. The whole point of the Act was to provide the newly created Department of Transportation with comprehensive regulatory authority to prescribe uniform and exclusive federal regulation for rail safety. This is plain on the face

⁸ See CSXT Br. 12 (88 percent decrease in fatalities since 1974); accord, Br. for U.S. in *Alabama Highway Dep't v. Boone*, No. 90-1412 at 2 (1991). In 1990, the most recent year for which statistics are available, there were 568 fatalities at highway/grade crossings, a decline of "16.7 percent" from the previous year, and notable in light of "a 1.9 percent increase in miles traveled." Report of the Secretary of Transportation to the United States Congress, The 1992 Annual Report on Highway Safety Improvement Programs, at S-1, S-2 (April 1992).

of the statute. Congress began the statute by authorizing the Secretary to issue rules and regulations "for all areas of railroad safety." 45 U.S.C. § 431(a). The first sentence of Section 434 states that Congress's intent is to make the laws "relating to railroad safety . . . nationally uniform to the extent practicable." *Id.* at § 434. Congress underscored the need for uniformity in grade crossing regulation by singling out grade crossings for "a comprehensive study" by the Secretary. *Id.* at § 433.⁹

Hammering out the scope of pre-emption was the turning point in the process of enacting FRSA.¹⁰ The Secretary's original bill would have pre-empted all state law (except in specified areas) automatically after two years.¹¹ Concerned that it might be infeasible for the Secretary comprehensively to regulate all aspects of rail safety within two years, thereby creating "a lapse in regulation," the final bill modified the pre-emption provision to take effect as each new national regulation was adopted.¹² The only other instance in which state law remains in force is where necessary to address uniquely local situations not susceptible to nationwide standards. See *infra* Part V.

Congress believed that uniform federal regulation was essential to achieving rail safety—that is why Congress included an express pre-emption provision. The lives

⁹ The legislative history makes clear that Congress intended to take charge of and achieve uniformity in all aspects of rail safety, not simply, as respondent argues (Resp. Br. 21), in enforcement. See, e.g., S. Rep. No. 619, 91st Cong., 1st Sess. 5 (1969); 116 Cong. Rec. 27611 (1970) (statement of Rep. Staggers); *id.* at 27612 (statement of Rep. Springer); *id.* at 27613 (statement of Rep. Pickle).

¹⁰ Hearings Before the Subcomm. on Transportation and Aeronautics of the Comm. on Interstate and Foreign Commerce on H.R. 7068, H.R. 11417, H.R. 14478, and S. 1993, 91st Cong., 2d Sess. 43, Ser. No. 91-51 (1970) (statement of Rep. Springer) ("1970 Hearings"); *id.* at 141 (statement of Rep. Kuykendall).

¹¹ See Hearings on H.R. 16980 Before the House Comm. on Interstate and Foreign Commerce, 90th Cong., 2d Sess. 1-6, Ser. No. 90-39 (1968) (H.R. 16980 Section 4).

¹² 1970 Hearings at 29 (testimony of Secretary Volpe).

saved and injuries avoided since 1974 show that Congress was right. Respondent's argument that this watershed national legislation was meant largely to affirm state-regulatory authority is untenable.

B. The Presumption Against Pre-emption Is Inapplicable To Section 434.

Respondent and *amici*, including the Solicitor General, also argue that this Court should construe Section 434 in light of a presumption against pre-emption. They rely on *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), and *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992).

Rice, however, was an implied pre-emption case. This Court already has rejected the counterintuitive argument that courts should follow *Rice* and presume that Congress does not intend to pre-empt state law where Congress has expressly provided in the statute for pre-emption of state law. In *Aloha Airlines, Inc. v. Director of Taxation*, 464 U.S. 7 (1983), a unanimous Court reversed a state supreme court decision that looked "beyond the plain language of the federal statute" to the principles in *Rice* to hold that state law was not pre-empted. *Id.* at 12. Noting that "*Rice* and its progeny . . . involved the implicit pre-emption of state statutes," the Court held that "[r]ules developed in these cases . . . have little application when a court confronts a federal statute . . . that explicitly pre-empts state laws." *Id.* at n.5. See also *Exxon Corp. v. Hunt*, 475 U.S. 355, 362 (1986).

Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608 (1992), on which respondent and the Solicitor General also rely, is not to the contrary. That case involved a pre-emption provision that Congress had drawn "narrowly" (*id.* at 2618), and that, as the separate opinion of Justice Blackmun stated, was framed "ambiguously." *Id.* at 2625-26. Given the statute's ambiguity and its narrow pre-emptive purpose, it was consistent with congressional intent for the Court "fairly but . . . narrowly" to construe the pre-emption provision. *Id.* at 2621. Nothing in *Cipollone* or

Rice purports to alter the basic principle that, in cases of express pre-emption, the question of how broadly or narrowly Congress meant to pre-empt state law is answered by the "ordinary meaning" of the statutory language. *FMC Corp. v. Holliday*, 111 S. Ct. 403, 407 (1990); see *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985); *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2036 (1992).

C. The Secretary's Intent Is Irrelevant And The Solicitor General's Views Are Entitled To No Deference.

The Solicitor General offers two reasons why this Court should defer to his views in construing the scope of pre-emption under Section 434. First, he argues that because pre-emption under Section 434 is triggered by the issuance of federal regulations, the "pre-emptive scope [of Section 434] is . . . determined by the intent of the issuing authority." S.G. Br. 14. The cases on which he relies, however, involve statutes that differ in a crucial way from FRSA—they lack any express pre-emption provision. See *Hillsborough County v. Automated Medical Lab., Inc.*, 471 U.S. 707, 714 (1985); *Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 144-45, 154 (1982). These cases stand only for the principle that agency intent is relevant where Congress has not spoken expressly to the question of pre-emption, and has merely given the agency general authority. *Id.* In contrast, in Section 434, Congress expressly identified the circumstances in which state law is pre-empted. Congress decided that pre-emption shall occur once a regulation is adopted that covers the subject matter of a state law. Under Section 434, it is not open to the Secretary to choose whether or not to pre-empt state law when issuing a regulation on a particular subject matter, and therefore the Secretary's intent is irrelevant.¹³

¹³ Accordingly, the Solicitor General's conclusion that there is no pre-emption of claims like respondent's because it is improper to infer from the Secretary's "silence" an intent to pre-empt is untenable. See S.G. Br. 24 n.27, 26.

Second, the Solicitor General asserts that his brief is "entitled to deference" because it presents the "view of the responsible agency." S.G. Br. 22. But this Court has repeatedly "declined to give deference to an agency counsel's interpretation of a statute where the agency itself has articulated no position on the question" *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988); see *Investment Co. Inst. v. Camp*, 401 U.S. 617, 627-28 (1971) (same); cf. *Exxon Corp.*, 475 U.S. at 363-70 (rejecting "the Solicitor General's reading of the [statute's] pre-emptive scope" without suggesting any deference was due). In this case, the Solicitor General's argument was developed only in response to this Court's invitation to brief the case. In recommending that the Court grant this case, the Solicitor General, after consultation with and review by the Department of Transportation, was unable to state on the merits whether either of respondent's claims was pre-empted. See Br. for U.S. on Petitions For Writs Of Certiorari at 15. Neither the Solicitor General nor respondent nor any *amicus* has pointed to a single sentence anywhere in the Secretary's regulations or reports expressly stating an intent to pre-empt or not to pre-empt the railroad's duties to select traffic control signals at grade crossings or to travel at safe speeds. Accordingly, the Solicitor General's views are not entitled to deference.

III. UNDER SECTION 434, THE SECRETARY'S REGULATIONS PRE-EMPT RESPONDENT'S GRADE CROSSING CLAIM.

To determine pre-emption under Section 434, only two questions need to be answered: (1) what is the subject matter of the state requirement, and (2) do the Secretary's standards and regulations cover that subject matter? Respondent defined the subject matter as identifying hazardous grade crossings, proposing appropriate traffic control devices, and installing and paying for such devices where appropriate. The Solicitor General's definition focuses on the railroad's duty to participate in the Rail-Highway Crossings Program. Under either definition,

the Secretary, both in 23 C.F.R. Parts 924 and 1204.4 and in the MUTCD, has promulgated regulations and standards that cover this subject matter. Respondent's grade crossing claim is pre-empted also under either the Solicitor General's limited "federal funding" theory or the Ninth Circuit's decision in *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149 (9th Cir. 1983).

A. The Secretary's Regulations At 23 C.F.R. Parts 924 And 1204.4 Cover The Subject Matter Of Determining When Public Grade Crossings Need Additional Traffic Control Devices And Designing And Implementing Plans To Install Those Devices.

Respondent initially describes the railroads' duty as "determining that improved grade crossing devices are needed, seeking approval from the state and implementing the devices with their own funds should the request be approved but federal funds not be made available." Resp. Br. 6. Respondent later refers, more simply, to the railroad's duty "to install gate arms at hazardous crossings." *Id.* at 50. The two reduce to the same duty, because the railroad cannot carry out a state tort law duty to install gate arms at hazardous crossings without first surveying all of the crossings its trains pass through and then designing, proposing, and implementing projects to install new traffic control devices.

The Secretary's regulations in 23 C.F.R. Parts 924 and 1204.4 cover this subject matter. These regulations implement the federally mandated Highway Safety Improvement Program and Rail-Highway Crossing Program, which make each state responsible for evaluating *every* grade crossing for potential hazards, ranking each crossing in terms of risk, and implementing appropriate improvement projects. See 23 C.F.R. §§ 924.9, 924.11, 1204.4 Nos. 12.I.G and 13.D.5; CSXT Br. 28-30. Indeed, these regulations—and the legislation that prompted them—track virtually word-for-word the state tort law duty that respondent describes. Compare Resp. Br. 6 (quoted above) with 23 U.S.C. § 130(d) ("Each state"

must "identify those railroad crossings which may require . . . protective devices . . . and implement a schedule of projects for this purpose") and 23 C.F.R. §§ 924.9 (a)(4), 924.11 (to comply with 130(d), states must perform an "[o]n-site inspection of public grade crossings," rank the "relative hazard" of those grade crossings "based on a hazard index formula" and on potential danger due to "passenger trains, school buses, transit buses, pedestrians, bicyclists, or by trains and/or motor vehicles carrying hazardous materials," and must "schedule and implement [those] safety improvement projects").¹⁴

These regulations pre-empt the railroads' state tort law duty independently to assess the need for additional traffic control devices. They replace that former independent state tort law duty with a new federally imposed duty to participate in each state's federally mandated Highway Safety Improvement Program. Railroads provide a "signal engineer" to serve as one member of a "diagnostic team" that also includes "a highway traffic engineer" and other public officials as appropriate, and that performs "an engineering and traffic investigation" to determine "which type of traffic control system is required at a crossing." DOT Study at 4-9; see MUTCD Handbook 8-1 (1983) ("the highway engineer and the railroad engineer will share responsibilities at the grade crossing . . . both must be involved in the decisionmaking process").¹⁵ The state must be involved in each crossing

¹⁴ Only *amicus* ATLA argues (Br. 12-14) that these regulations do not trigger pre-emption because the Secretary did not promulgate them pursuant to the FRSA. *Amicus* ignores the dispositive point, however, that under the plain language of Sections 433 and 434 any regulation related to rail safety issued by the Secretary pre-empts state law. See CSXT Br. 37; S.G. Br. 19 n.17.

¹⁵ The Solicitor General edits parts of this passage in his brief to suggest that the shared responsibility is to "select appropriate traffic control devices." S.G. Br. 21. The Handbook does not say that, nor could it; the Manual makes clear that the railroad's role is to provide engineering support for the evaluation, but that the

evaluation for two reasons. First, as respondent and the Solicitor General concede (Resp. Br. 28; S.G. Br. 20 n.18), the state has exclusive authority to determine whether traffic control devices may be installed on public roadways. Second, the Secretary has mandated that the state take into consideration factors, such as future demographic changes and ancillary effects on highway safety, that state and local governments are uniquely suited to know of and consider. 23 C.F.R. § 924.9(a)(4)(v). In short, the Secretary has determined that railroads may not and ought not make unilateral decisions to install traffic control devices.

Respondent and the Solicitor General have no persuasive answer to this point. They first suggest that the existence of this federally mandated scheme does not displace the analogous state tort law duty because there is no inevitable conflict in having two parallel evaluation processes. They argue that the railroad, in addition to participating in the federal scheme, should make its own unilateral judgments about which crossings need additional traffic control devices, and "if the state or local agency refuse[s] the railroad's request, the railroad would have an excellent defense to a negligence claim." Resp. Br. 6; see S.G. Br. 20-21 n.19. This argument fails because pre-emption under Section 434 does not depend on proof of a conflict between state and federal regulation. Under Section 434, pre-emption turns on a showing that the subject matter of the state law has been covered by the Secretary.

Respondent also argues that the Secretary's regulations "only appl[y] to crossings updated with federal funds and merely provide[] guidelines for prioritization of crossings eligible to receive those funds." Resp. Br. 5, 25. This is incorrect. While it is true that the regulations at 23 C.F.R. § 646.214 apply only to federally funded proj-

decision about whether or not to install a particular device is exclusively the public authority's decision to make. See MUTCD 1A-3, 8A-1, 8D-1.

ects, the Highway Safety Improvement Program set forth in Part 924 applies to every public grade crossing in the state. Many of these projects are implemented without federal funds (see DOT Study at 3-7, 3-8), an approach that the Secretary contemplated in the notice setting forth the Final Rule. See 44 Fed. Reg. 11544 (1979) ("The logical conduct of a highway safety improvement program should be virtually independent of the nature of the program's funding").

The Solicitor General argues that Part 924 "does not explicitly or implicitly suggest that a railroad has *no* responsibility to identify hazardous crossings and to provide necessary improvements when federal funds have not been allocated for that purpose." S.G. Br. 26. That is not the point. Railroads do have continuing obligations to identify certain hazards, *e.g.*, those related to operation and maintenance of traffic control devices, as well as to contribute information and resources to the states' crossing review efforts. *E.g.*, 49 C.F.R. Part 234; see also U.S. DOT, Railroad-Highway Grade Crossing Handbook 52-54 (2d ed. 1986). But because Congress and the Secretary have created a process for identifying hazardous crossings in which the states have exclusive responsibility for determining whether particular crossings need additional protective devices, the imposition under state law of a duplicative duty upon CSXT is pre-empted.

The Solicitor General confuses the issue by arguing that the "basic issue . . . in this case" is whether railroads continue to have a tort law duty "to participate in the process of providing safe grade crossings." S.G. Br. 18; see also *id.* at 11, 19, 24 n.26. The "process" to which the Solicitor General refers is not the historic state law duty of railroads independently to provide safe grade crossings. Rather, it is a new duty to participate in the federally mandated Rail-Highway Crossings Program:

The Rail-Highway Crossings Program *requires the States to implement a program to survey grade crossings and implement improvement projects, and pre-*

scribes factors to be considered in that process. See 23 U.S.C. § 130; 23 C.F.R. Pts. 646, 655, 924. We see no reason to infer from that scheme that a state law "requirement" that railroads participate in that process was displaced by silence.

S.G. Br. 24 n.27 (emphasis added).

CSXT has never argued, however, that a state law duty to participate in the process created by the federal Rail-Highway Crossings Program was pre-empted. The "process" under that Program requires that the railroads respond to a State's requests for information or assistance to enable *the State* to determine the appropriate traffic control devices for each crossing, install the traffic control devices that the State has determined are necessary, and maintain those devices in working order.

Respondent has not claimed that CSXT has breached its duty to participate in this process. Respondent's claim is that CSXT had an independent duty, regardless of what the state did, to see to it that appropriate traffic control devices are in place at all crossings. This claim is viable only if CSXT has an independent duty to make its own individual determination whether grade crossings need additional traffic control devices. Because the Secretary's regulations cover the subject matter of making such determinations, respondent's claim is pre-empted by Section 434.

B. The Secretary's Traffic Control Standards Set Forth In The MUTCD Also Cover The Subject Matter.

Respondent and *amici* do not dispute that the Manual on Uniform Traffic Control Devices (MUTCD) has been incorporated as a whole into federal regulations and therefore has pre-emptive force under Section 434. See 23 C.F.R. § 655.601(a). The Solicitor General argues, however, that "the crucial sentence" in the MUTCD, "which states that '[t]he determination of need and selection of devices at grade crossings is made by the public agency with jurisdictional authority'—merely describes the process that has long governed the selection of traffic

control devices." S.G. Br. 20 (quoting the MUTCD at 8A-1); see also MUTCD at 8D-1 ("The selection of traffic control devices at a grade crossing is determined by public agencies having jurisdictional responsibility at specific locations").

The Solicitor General's attempt to dismiss the language of the MUTCD fails for two reasons. First, as the Solicitor General acknowledges (Br. 20 n.18), the MUTCD elsewhere mandates that public authorities have exclusive responsibility for decisions regarding traffic control devices: "Traffic control devices *shall* be placed *only* by the authority of the public body or official having jurisdiction." MUTCD 1A-3.1 (emphasis added).

Second, the very passage on which the Solicitor General has focused speaks not simply of the final authority to approve devices but of the "determination of need" for the devices. MUTCD 8A-1. That determination—which is precisely what respondent claims that CSXT had an independent state law obligation to make—has therefore been assigned by the Secretary to the public authority. Each of the federal courts of appeals that has interpreted the MUTCD has so held. *Marshall v. Burlington N., Inc.*, 720 F.2d 1149, 1154 (9th Cir. 1983); *Hatfield v. Burlington N. R.R.*, 958 F.2d 320, 323 (10th Cir. 1992), *petition for cert. filed*, 61 U.S.L.W. 3016 (U.S. June 8, 1992) (No. 91-1977).

Third, even if the crucial language of the MUTCD were merely "descriptive" rather than prescriptive, it is descriptive of the post-FRSA statutory and regulatory scheme that created a uniform and effective process for evaluating and upgrading traffic control devices at grade crossings. As the MUTCD states and as CSXT acknowledges, the system is one where states and railroads have "joint responsibility" for crossing safety. MUTCD 8A-1; see *supra* pp. 2-6. But the concept of "joint responsibility" is not incompatible with assigned duties. Indeed, the preceding sentence in the MUTCD acknowledges that both the "highway agency and the railroad company"

have "assigned duties." MUTCD 8A-1. And the very next sentence in the MUTCD specifies that the "determination of need" is *not* jointly assigned, but rather is the responsibility of "the public agency with jurisdictional authority." *Id.*; see also *id.* at 8D-1 ("Before a new or modified grade crossing traffic control system is installed, approval is required from the appropriate agency within a given State"). Thus, Part VIII of the MUTCD, added after the passage of FRSA, at the very least confirms that the Secretary's regulations cover the subject matter of determining when additional traffic control devices are needed. The railroads' former state law duty to make that same judgment is therefore pre-empted.¹⁶

C. Respondent's Claim Also Is Pre-empted By The Secretary's Regulations In Part 646.

The Solicitor General argues that the Secretary's regulations do pre-empt state tort law duties, but only where the grade crossing at issue has been "improved with the use of federal funds," and only then where no showing of intervening "changed circumstances" or railroad negligence in the upgrade process is made. S.G. Br. 24 & n.26. This novel theory, which the government has not previously advanced and which no court has adopted, is incorrect; in any event, there would be pre-emption in this case even if the Court were to accept this theory.

1. The Solicitor General's theory that state tort law is pre-empted only at crossings upgraded with federal

¹⁶ One *amicus* suggests that pre-emption based on MUTCD is unconstitutional under *New York v. United States*, 112 S. Ct. 2408 (1992), because the federal government "cannot force the states" to "regulate the selection of crossing signalization" via pre-emption rather than "through the use of incentives." ATLA Br. 17-18 n.5. Here, however, Congress has provided an incentive for states to adhere to MUTCD and the rest of the highway safety regulations—the availability of federal highway funds. *E.g.*, 23 U.S.C. § 130. Moreover, Congress's use of an express pre-emption provision in FRSA satisfies fully its obligation to give the states notice of the implications for state law of the acceptance of such funds. See *South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987).

funds is based solely on a reading of one regulatory provision, 23 C.F.R. § 646.214(b). CSXT agrees with the Solicitor General that subsections 646.214(b)(2) and (3)(i) establish when traffic control devices will be deemed "adequate" at federally funded projects and therefore pre-empt claims like respondent's with respect to such crossings. CSXT Br. 34; S.G. Br. 23.

The Solicitor General argues, however, that pre-emption is limited to crossings upgraded with federal funds because "[n]o regulation of the Secretary addresses the duty of the railroad to improve the safety of a grade crossing when the State decides not to utilize limited federal funds for that purpose." S.G. Br. 27. This ignores 23 C.F.R. Parts 924 and 1204.4. As discussed above, these regulations require the states to survey and improve their crossings regardless of whether or not they choose to seek federal funds. When a state chooses to spend federal funds, the criteria identified in Section 646.214(b) for adequate warning devices are applicable. But where the state chooses not to use federal funds, the Secretary's regulations require the state to apply the criteria set forth in Section 924.9(a)(4) to determine whether improvements are needed, a process in which the standards set forth in 23 C.F.R. § 646.214(b) (for determining whether gates are needed at federally funded projects) should be considered. MUTCD Handbook at 8-31. The Secretary's regulations therefore cover what the Solicitor General agrees is the relevant subject matter—the duty to decide whether a particular public crossing needs additional control devices.

By relying upon Section 646.214(b) out of context, the Solicitor General has now proposed a rule having irrational consequences. Consider a state's decision to use federal funds to upgrade one crossing to the standard of another crossing, in the same town, that had previously been upgraded with state and private funds. In the Solicitor General's view, a plaintiff would have a viable tort claim against the railroad if injured at the crossing funded by the state, even though its level of protection is

identical to that which had been determined to be adequate in the recently completed, federally funded project.

Consider also a situation in which a local or state authority decides not to use available federal funds to add traffic control devices because of the danger and burden that those devices would present to existing highway traffic. Under the Solicitor General's view, a plaintiff would have a viable tort claim against the railroad even though the decision not to improve the crossing was entirely a public decision. That is this case. The City of Cartersville rejected the diagnostic team's initial recommendation that gates be installed at Cook Street because that would have required the construction of a traffic island that the City decided would pose a danger to highway traffic. J.A. 17, 32. The City's concern with traffic islands is understandable; Part V of the MUTCD is devoted exclusively to issues regarding use of traffic islands, and the Secretary has recognized the danger at crossings of accidents that do not involve trains. *E.g.*, DOT Study 2-12. Nothing in the record supports the Solicitor General's speculation (S.G. Br. 3, n.1) that a lack of funds influenced the City and the State's decisions; rather, once the public authorities rejected the Georgia Department of Transportation's (GDOT's) proposal, the federal funds previously earmarked for a gate at Cook Street were transferred to other projects. J.A. 15-17, 28-34.

Adopting the Solicitor General's approach also would require extensive and needless litigation. What, for example, is the proper definition of a federally funded project? The Solicitor General appears to assume that it includes only those crossings that are actually improved with federal funds, yet under the "corridor approach" endorsed by the Secretary (DOT Study at 4-15), states may analyze several crossings simultaneously and receive federal funding for a plan that includes upgrades only at some crossings. Similar difficulties would arise over the definition of elements such as what constitutes "changed circumstances."

Finally, Congress has interposed a significant obstacle to the very inquiry that the Solicitor General now says should be central to these cases. In 23 U.S.C. § 409, Congress has barred courts from admitting into evidence, "consider[ing] for any other purposes," or even allowing discovery of, the very records relating to funding that would be necessary to decide these cases under the Solicitor General's new proposal. As the Solicitor General elsewhere has recognized, Congress did so at the request of state highway departments concerned about the tort liability that their responsibility for making decisions about traffic control devices had created. See Br. for U.S. in *Alabama Highway Dep't v. Boone*, No. 90-1412, at 10 (1991).

2. Without any citation, the Solicitor General asserts that "[t]he grade crossing claim is not pre-empted because there is no evidence that the Cook Street crossing was improved using federal funds." S.G. Br. 26; see *id.* at 12 (same). The Solicitor General is wrong.

The affidavit of Wendall A. Hester, a traffic engineer with the GDOT, expressly states that the GDOT considered Cook Street together with four other crossings in Cartersville and that improvements at four of the crossings "were funded through our Federal and State Railroad Crossing Safety Program." J.A. 16 ¶ 5. This project involved a corridor approach in which the public authority simultaneously reviewed multiple crossings in close proximity. The Cook Street crossing was an integral part of this project and, pursuant to 23 C.F.R. § 646.214(b)(2), federal funds could not have been approved for this project unless the warning devices were deemed "adequate," which they were determined to be.

Hester's affidavit establishes also that the GDOT specifically approved the expenditure of project funds on an "upgrade of the motion detector at Cook Street." J.A. 17 ¶ 7. Hester's affidavit states that "the cost for this upgrade was included in the estimated costs proposal prepared by the Railroad for the West Avenue crossing improvements and authorized and approved by my sec-

tion." *Id.* (emphasis added). The MUTCD recognizes that motion detection circuitry is a basic component of an active warning device system. MUTCD 8C-5. Nothing in the record contradicts, or is even inconsistent with, the facts as stated in Mr. Hester's affidavit. Even under the government's theory of federal funds pre-emption, therefore, this record requires pre-emption of respondent's claim with respect to lack of gates at Cook Street.

D. Respondent's Claim Is Pre-empted Under *Marshall*.

Respondent argues that pre-emption is inappropriate under the test set forth in *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149, 1154 (9th Cir. 1983). Although respondent concedes that public authorities evaluated the crossing, she argues that "there has never been a federal decision that the warning device at Cook Street was adequate." Resp. Br. 33.¹⁷

¹⁷ In making this argument, respondent mischaracterizes the deposition testimony of her expert, Mr. Burnham. To begin with, respondent neglects to mention that the district court excluded this testimony from the record on summary judgment because it was not timely presented. Pet. App. 24a. Respondent nevertheless relies on this testimony to assert that due to "difficulties from the railroad side, the project was not moving," and that "the Georgia DOT, afraid of losing money which had been earmarked for this project, transferred the funds to an active one." Resp. Br. 33. In fact, Mr. Burnham twice stated that while he initially thought that there had been delay on the railroad's part, he "subsequently learned that the railroad determined that they would be able to change the transmission line and they subsequently did and then we continued on with the project." J.A. 33; see *id.* at 31 ("what I found out was that the railroad did continue to cooperate in relocating the transmission line").

Mr. Burnham's testimony simply reinforces that of Mr. Hester, whose affidavit was properly in evidence, by showing that the State, pursuant to its federally mandated grade crossings program, evaluated the Cook Street crossing and made a decision not to install gate arms. Mr. Burnham confirms that the construction of traffic islands was "not compatible with the City of Cartersville." J.A. 32. Thus, Burnham and Hester agree that the decision whether or not to add gate arms at Cook Street was made by the public authority with jurisdiction.

Respondent's argument misses the point of *Marshall*, which was to preserve the railroad's state law duty to ensure the presence of adequate warning devices until the state had acted pursuant to federally delegated authority. The court found no pre-emption because "[t]he locality in charge of the crossing in question ha[d] made no determination under the manual regarding the type of warning device to be installed at the crossing." 720 F.2d at 1154.¹⁸ Here, it is undisputed that the public authority did make such a determination. The GDOT, pursuant to its "State and Federal funded Grade Crossing Safety Program" (J.A. 15-16 ¶ 3), had a diagnostic and engineering team evaluate each of the crossings in Cartersville, Georgia, including Cook Street. The GDOT initially recommended that gate arms be installed, the City objected to that design, and the State ultimately decided not to order the installation of gate arms. See J.A. 15-17, 29-33; see also *supra* at 21 n.17.

These undisputed facts establish pre-emption under the unduly narrow test of *Marshall*. See CSXT Br. 38-39. Whether the public authorities made the "correct" decision is immaterial to pre-emption of the claim against CSXT, although it may be relevant to a tort claim against the State. The dispositive point is that "a federal decision [was] reached through the local agency on the adequacy of the warning devices at the crossing." *Marshall*, 720 F.2d at 1154. By taking responsibility for evaluating and deciding whether or not to add gate arms to the Cook Street crossing, the local agency exercised its federally delegated authority and thereby triggered pre-emption of any state law duty imposed on railroads to make that same determination.

¹⁸ Accordingly, *Marshall* should not be read as limiting pre-emption to circumstances where a state has affirmatively stated that crossing devices are "adequate." Such statements are not required by federal law, and evidence of them would not be admissible under 23 U.S.C. § 409. See CSXT Br. 38-39.

IV. RESPONDENT'S TRAIN SPEED CLAIM IS ALSO PRE-EMPTED.

Respondent's argument against pre-emption of her train speed claim is premised on the theory that "[a] federal regulation addresses the 'same subject matter' of a state requirement *only* if both regulations address the same safety concerns." Resp. Br. 41 (citation omitted). Respondent's premise is false. This Court has repeatedly held that pre-emption "turns not on whether federal and state laws 'are aimed at distinct and different evils' " but on whether they " 'operate upon the same object.' " CSXT Br. 45 (quoting *Gade v. National Solid Wastes Management Ass'n*, 112 S. Ct. 2374, 2387 (1992)); see also *Perez v. Campbell*, 402 U.S. 637, 651-52 (1971). This basic principle has particular force where, as here, Congress has expressly ordered pre-emption when the Secretary has adopted a regulation "covering the subject matter" of the state requirement. 45 U.S.C. § 434. Respondent cannot escape the fact that the subject matter of the Secretary's regulations and the state law duty are the same—the speed at which trains may travel.

Even if respondent were correct that the Secretary's safety regulations and standards must address the same safety concerns as the state law, the Secretary plainly has done so with respect to the state's concerns here. The Secretary requires that active control devices be designed to provide motorists with at least 20 seconds of advance warning regardless of the speed of the advancing train. CSXT Br. 45-46 (quoting MUTCD 8C-7); see also MUTCD Handbook at 8-53. As for passive control devices, the Secretary requires that they be placed to take into account the "given speed" of the train. MUTCD Handbook 8-69; see *id.* at 8-69 at 8-74. If the physical characteristics of the crossing preclude the signs from being posted to give the motorist adequate warning to avoid a collision with a train traveling at that speed, then "consideration should be given to the installation of active crossing devices." *Id.* at 8-74; see also CSXT Br. 46 (hazard assessment pursuant to 23 C.F.R. § 924.9 takes

into account train speed); MUTCD Handbook at 8-59 (diagnostic team must consider, *inter alia*, "train and vehicle speed"). In sum, the Secretary has addressed the risk that train speed poses at grade crossings by promulgating maximum operating speeds that the Secretary has found to be safe, and by designing traffic control devices to provide motorists with adequate warning of trains given those speeds.

V. SECTION 434'S EXCEPTION FOR ESSENTIALLY LOCAL SAFETY HAZARDS DOES NOT APPLY TO THE CLAIMS IN THIS CASE.

Finally, respondent argues that because state tort law "requires different things at different times of day" and at different crossings, it addresses essentially local safety hazards and is not pre-empted. Resp. Br. 48-50.¹⁹ Respondent would have the local hazard exception in Section 434 swallow the rule that reference to the word "law" in an express pre-emption provision includes tort law. See CSXT Br. 23-27. Under respondent's view, every crossing would present a local safety hazard.

That is not what Congress enacted. The House Report explains that Congress had "no intent to permit a State to establish Statewide standards superimposed on national standards covering the same subject matter."²⁰ Yet respondent concedes that the state tort duties here—which

¹⁹ The court of appeals rejected this argument. Pet. App. 6a-7a n.3. The Solicitor General agrees that the local hazard exception is inapplicable here. S.G. Br. 15 n.11.

²⁰ H.R. Rep. No. 1194, 91st Cong., 2d Sess., reprinted in 1970 U.S.C.C.A.N. 4104, 4117 ("House Report"). At the hearings, advocates of this exception explained that it would apply only to uniquely local hazards, such as that posed by the "horseshoe curve" in the track at Altoona, Pa., a stretch of track so unusual that it was designated a national landmark. 1970 Hearings at 75, 85 (testimony of G. Bloom, T. Goodfellow). See also *id.* at 36 (statement of Secretary Volpe); *id.* at 114 (statement of Mr. Moloney); 116 Cong. Rec. 27612 (statement of Rep. Springer); *Armijo v. Atchison, T. & S. F. Ry.*, 754 F. Supp. 1526, 1532-33 (D.N.M. 1990), appeal docketed, Nos. 91-2084, 91-2088 (10th Cir. 1991).

are imposed by state statute²¹—are "statewide" standards. Resp. Br. 49. Similarly, the House Report states that "[t]he purpose of this . . . provision is to enable the States to respond to local situations not capable of being adequately encompassed within uniform national standards."²² Yet the Secretary can and has set forth national standards that address the concerns that respondent claims state tort law would address. Compare Resp. Br. 49 (state law considers "time of day, the weather conditions, the frequency of vehicle or truck traffic across different grade crossings, and the adequacy of the protection") with MUTCD 8A-1 to 8A-2, 8B-5 (requiring reflectorized signs at all crossings to improve visibility at all times of day, and illumination where additional visibility is needed) and 23 C.F.R. § 924.9(a)(4)(iii), (v) (requiring states to consider existing warnings and density of traffic over the crossing in evaluating need for new signals). At bottom, a blanket exception for state tort law relating to rail safety at grade crossings is irreconcilable with Congress's decisions to pre-empt "any law" that relates to a subject matter covered by the Secretary's regulations (45 U.S.C. § 434) and to create a nationally guided Rail-Highway Crossings Program (23 U.S.C. § 130(d)) to address those risks at every public grade crossing.

CONCLUSION

For these reasons and those stated in CSXT's opening brief, the judgment in No. 91-790 should be reversed and the judgment in No. 91-1206 should be affirmed.

²¹ See Ga. Code Ann. § 51-1-2 (1991) (defining duty to use ordinary care); see also *id.* § 46-8-190 (railroad must "exercise due care in approaching the crossing").

²² House Report at 4117.

Respectfully submitted,

JACK H. SENTERFITT *

RICHARD T. FULTON

JAMES W. HAGAN

ALSTON & BIRD

1201 West Peachtree

Atlanta, Georgia 30309-3424

(404) 881-7000

HOWARD J. TRIENENS

CARTER G. PHILLIPS

MARK E. HADDAD

LAURA V. FARTHING

SIDLEY & AUSTIN

1722 Eye Street, N.W.

Washington, D.C. 20006

(202) 736-8000

Counsel for Petitioner in No. 91-790

Counsel for Cross-Respondent in No. 91-1206

November 16, 1992

* Counsel of Record

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OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

CSX TRANSPORTATION, INC., PETITIONER

v.

LIZZIE BEATRICE EASTERWOOD

LIZZIE BEATRICE EASTERWOOD, PETITIONER

v.

CSX TRANSPORTATION, INC.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING AFFIRMANCE

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

WALTER B. MCCORMICK, JR.
General Counsel

MAUREEN E. MAHONEY
Deputy Solicitor General

PAUL M. GEIER
*Assistant General Counsel
for Litigation*

WILLIAM K. KELLEY
*Assistant to the Solicitor
General*

DALE C. ANDREWS
*Deputy Assistant General
Counsel for Litigation
Department of
Transportation
Washington, D.C. 20590*

WILLIAM KANTER
JEFFREY CLAIR
*Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217*

QUESTIONS PRESENTED

1. Whether federal statutes and regulations relating to railroad-highway grade crossings preempt a state law cause of action against a railroad based on the alleged breach of the railroad's duty to provide adequate safety devices at grade crossings.

2. Whether federal regulations setting speed limits for trains on all classes of track nationwide preempt a state law cause of action against a railroad for operating its train at an unreasonable speed.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	10
Argument:	
I. State law requirements relating to rail safety are not preempted by FRSA unless the Secretary has adopted regulations covering the same subject matter as the state requirement at issue.....	13
II. Federal law has not preempted all state law duties on railroads to maintain safe grade crossings, but has preempted such duties at grade crossings improved using federal funds	17
A. The MUTCD does not oust the States' traditional police power to require railroads to provide safe grade crossings	18
B. The regulations implementing the Rail-Highway Crossings Program do not entirely preempt State law duties of care, but do preempt States from requiring railroads to provide more or different safety devices at crossings that are improved using federal funds	23
C. The grade crossing claim is not preempted because there is no evidence that the Cook Street crossing was improved using federal funds	26
III. State law requirements concerning train speed are preempted by FRSA because the Secretary has adopted regulations covering the subject matter of train speed	27
Conclusion	30

IV

TABLE OF AUTHORITIES

Cases:	Page
<i>Arkansas v. Oklahoma</i> , 112 S. Ct. 1046 (1992)	22
<i>Bethlehem Steel Co. v. New York State Labor Relations Board</i> , 330 U.S. 767 (1947)	27
<i>Central of Georgia R.R. v. Markert</i> , 410 S.E.2d 437 (Ga. Ct. App. 1991)	2, 28
<i>Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.</i> , 467 U.S. 837 (1984)	22
<i>Cipollone v. Liggett Group, Inc.</i> , 112 S. Ct. 2608 (1992)	13, 14, 15
<i>Clifton v. Southern Pac. Transp. Co.</i> , 709 S.W.2d 636 (Tex. 1986)	17
<i>Continental Improvement Co. v. Stead</i> , 95 U.S. 161 (1877)	4
<i>Decker v. Norfolk & Western R.R.</i> , 265 N.W.2d 785 (Mich. Ct. App.), appeal denied, 403 Mich. 845 (1978)	17
<i>English v. General Electric Co.</i> , 496 U.S. 72 (1990)	14
<i>FMC Corp. v. Holliday</i> , 111 S. Ct. 403 (1990)	14
<i>Farmer v. United Brotherhood of Carpenters</i> , 430 U.S. 290 (1977)	14
<i>Fidelity Federal Savings & Loan Ass'n v. De La Cuesta</i> , 458 U.S. 141 (1982)	14
<i>Florida Lime & Avocado Growers, Inc. v. Paul</i> , 373 U.S. 132 (1963)	14
<i>Gade v. National Solid Wastes Management Ass'n</i> , 112 S. Ct. 2374 (1992)	13-14, 30
<i>Grand Trunk R.R. v. Ives</i> , 144 U.S. 408 (1892)	4
<i>Hatfield v. Burlington Northern R.R.</i> , 958 F.2d 320 (10th Cir. 1992), petition for cert. pending, No. 91-1977	18
<i>Hillsborough County v. Automated Medical Laboratories, Inc.</i> , 471 U.S. 707 (1985)	14, 16, 22
<i>Hines v. Davidowitz</i> , 312 U.S. 52 (1941)	14, 30
<i>Isom v. Schettino</i> , 199 S.E.2d 89 (Ga. Ct. App. 1973)	2
<i>Jones v. Rath Packing Co.</i> , 430 U.S. 519 (1977)	14
<i>Macon & Western R.R. v. Davis</i> , 18 Ga. 679 (1855)	15

V

Cases—Continued:	Page
<i>Marshall v. Burlington Northern, Inc.</i> , 720 F.2d 1149 (9th Cir. 1983)	18, 27
<i>Missouri Pacific R.R. v. Railroad Comm'n of Texas</i> , 833 F.2d 570 (5th Cir. 1987)	16
<i>Morales v. Trans World Airlines, Inc.</i> , 112 S. Ct. 2031 (1992)	16
<i>Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n</i> , 461 U.S. 190 (1983)	14
<i>Pennhurst State School & Hosp. v. Halderman</i> , 451 U.S. 1 (1981)	25
<i>Perkins v. National R.R. Passenger Corp.</i> , 298 N.W.2d 462 (Minn. 1979)	17-18
<i>Public Utilities Comm'n v. CSX Transp., Inc.</i> , 111 S. Ct. 781 (1991)	20
<i>Ray v. Atlantic Richfield Co.</i> , 435 U.S. 151 (1978) ..	27
<i>Rice v. Santa Fe Elevator Corp.</i> , 331 U.S. 218 (1947)	14
<i>Runkle v. Burlington Northern</i> , 613 P.2d 982 (Mont. 1980)	21
<i>Shaw v. Delta Air Lines, Inc.</i> , 463 U.S. 85 (1983) ..	14
<i>Southern Ry. v. Georgia Kraft Co.</i> , 373 S.E.2d 774 (Ga. Ct. App. 1988)	20
<i>Stromquist v. Burlington Northern, Inc.</i> , 444 N.E.2d 1113 (Ill. App. 1983)	17
<i>Wright v. Dilbeck</i> , 176 S.E.2d 715 (Ga. Ct. App. 1970)	20
Constitution, statutes, and regulations:	
U.S. Const. Art. VI, Cl. 2 (Supremacy Clause) ..	13
Federal Railroad Safety Act of 1970, Pub. L. No. 91-458, 84 Stat. 971 (45 U.S.C. 421 <i>et seq.</i>)	1, 4
45 U.S.C. 421	5, 22
45 U.S.C. 431	5
45 U.S.C. 431 (q)	5
45 U.S.C. 433 (a)	5
45 U.S.C. 433 (b)	5
45 U.S.C. 434	2, 3, 6, 10, 15, 16, 18, 19, 20, 29
45 U.S.C. 435 (a)	5
45 U.S.C. 436 (a)	5

VI

Statutes and regulations—Continued:

	Page
45 U.S.C. 436 (a) (2)	5
45 U.S.C. 436 (b)	5
45 U.S.C. 436 (b) (2)	5
45 U.S.C. 437	7
45 U.S.C. 438	7
45 U.S.C. 438-439	7
Highway Safety Act of 1973, Pub. L. No. 93-87, 87 Stat. 282	4, 6
23 U.S.C. 130	4, 6, 10, 11, 24
23 U.S.C. 130 (a)	6
23 U.S.C. 130 (b)	9
23 U.S.C. 130 (c)	9
23 U.S.C. 130 (d)	7, 10
Rail Safety Improvement Act of 1988, Pub. L. No. 100-342, § 23, 102 Stat. 639	5
23 U.S.C. 109 (d)	18
23 U.S.C. 409	25
Ga. Code Ann. § 32-6-190 (Michie 1991)	2
23 C.F.R.:	
Pt. 1:	
Section 1.14 (b) (1958)	9
Pt. 625:	
Section 625.3 (1974)	18
Pt. 646	24
Section 646.210 (a)	9, 25
Section 646.210 (b) (1)	9
Section 646.210 (d)	9
Section 646.214 (b)	3, 8, 9, 12, 18, 23, 24
Section 646.214 (b) (2)	23
Section 646.214 (b) (3) (i)	8, 23, 25
Section 646.214 (b) (4)	8, 24
Section 646.216 (b)	9
Pt. 655	24
Section 655.601-655.603 (1991)	10, 18
Section 655.601 (1974)	18
Section 655.603	9
Section 655.603 (b)	22

VII

Regulations—Continued:

	Page
Pt. 924	24
Section 924.7	7
Section 924.9	7
Section 924.9 (a)	7-8
Section 924.13	8
Section 924.15	8
Pt. 1204:	
Section 1204.4, Highway Safety Pro- gram Guideline No. 12 (G)	7
49 C.F.R.:	
Pt. 1:	
Section 1.48 (o)	5
Section 1.49 (m)	5
Pt. 201:	
Section 201.4	7
Pt. 213	7, 12, 28
Section 213.53	28
Section 213.55	28
Section 213.57	28
Section 213.59	28
Section 213.63	28
Section 213.109	28
App. A	7
Pt. 215:	
Section 215.9	28
Pt. 218:	
Section 218.29	29
Pt. 219:	
Section 219.213 (b)	17
Pt. 229:	
Section 229.9	28
Section 229.117	29
Pt. 236	28
Pt. 240:	
Section 240.305	28
56 Fed. Reg. 33,722 (1991) (23 C.F.R. Pt. 234)	7

VIII

Miscellaneous:	Page
91 A.L.R.2d (1963)	21
FRA Emergency Order No. 11, 44 Fed. Reg. 8402 (1979)	29
<i>Prevention of Rail-Highway Grade Crossing Acci- dents Including Railway Trains and Motor Ve- hicles</i> , 322 I.C.C. 1 (1964)	21-22
Report of the Secretary of Transportation to Con- gress, <i>Rail-Highway Crossings Study</i> (1989)	4, 9, 17, 21, 25, 26, 29, 30
U.S. Dep't of Transportation, Federal Highway Administration, Federal Highway Administra- tion Bulletin (Apr. 1, 1977)	19
U.S. Dep't of Transportation, <i>Manual on Uniform Traffic Control Devices</i> (1988)	9, 10, 11, 19, 20, 21, 29
U.S. Dep't of Transportation, <i>Railroad-Highway Safety Part I: A Comprehensive Statement of the Problem</i> (1971)	6, 25
U.S. Dep't of Transportation, <i>Railroad-Highway Safety Part II: Recommendations for Resolving the Problem</i> (1972)	6
U.S. Dep't of Transportation, <i>Traffic Control De- vices Handbook</i> (1983)	18, 21
<i>Webster's Third New International Dictionary</i> (1986)	16

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-790

CSX TRANSPORTATION, INC., PETITIONER

v.

LIZZIE BEATRICE EASTERWOOD

No. 91-1206

LIZZIE BEATRICE EASTERWOOD, PETITIONER

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ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING AFFIRMANCE

INTEREST OF THE UNITED STATES

This case concerns the preemptive effect of certain federal laws and regulations on state law tort claims arising out of accidents at railroad-highway grade crossings. The most pertinent federal statute at issue, the Federal Railroad Safety Act of 1970, 45 U.S.C. 421 *et seq.*, contains an express preemption provision triggered solely through regulatory action by the Secretary

of Transportation. See 45 U.S.C. 434. The Secretary of Transportation therefore has a strong interest in the interpretation of the rail and highway safety regulations that govern the outcome of this case.

STATEMENT

1. a. On the morning of February 24, 1988, Thomas Easterwood, the husband of respondent/cross-petitioner Lizzie Beatrice Easterwood, was killed when the truck he was driving was struck at the Cook Street grade crossing in Cartersville, Georgia by a train owned and operated by petitioner cross-respondent CSX Transportation, Inc. Following her spouse's death, Mrs. Easterwood sued the railroad for tort damages in her capacity as executrix of Mr. Easterwood's estate. Under Georgia law, CSX had a duty to provide adequate warning devices at the Cook Street crossing to ensure the safe passage of traffic. See Ga. Code Ann. § 32-6-190 (Michie 1991); see also *Central of Georgia R.R. v. Markert*, 410 S.E.2d 437 (Ga. Ct. App. 1991); *Isom v. Schettino*, 199 S.E.2d 89 (Ga. App. 1973). The Cook Street crossing was equipped with flashing lights, but did not have crossing gates. Mrs. Easterwood alleged, *inter alia*, that the railroad breached its duty of care because crossing gates, and not merely flashing lights, were necessary to make the crossing reasonably safe. CSX Pet. App. 10a. She also alleged that the railroad breached its common law duty to operate the train at a safe speed. *Id.* at 25a. CSX defended by claiming, *inter alia*, that Mrs. Easterwood's claims were preempted by federal laws and regulations pertaining to railroad safety.

b. Accepting CSX's preemption defense, the district court granted summary judgment for the railroad. CSX Pet. App. 28a. The court held that Mrs. Easterwood's allegations concerning both the adequacy of the crossing

signals and the safety of the train's operating speed were preempted by federal law. *Id.* at 26a-27a.¹

The court of appeals affirmed in part and reversed in part. The court agreed that Mrs. Easterwood's negligence claim based on excessive train speed was preempted by Federal Railroad Administration regulations. On the grade crossing issue, however, the court held that a railroad's state law duty to provide a safe grade crossing was not preempted, at least where the State has "neither upgraded the grade crossing nor affirmatively decided that the existing crossing was adequate." CSX Pet. App. 12a. The court reasoned that FRSA's express preemption provision, 45 U.S.C. 434, was not implicated because the Secretary had not promulgated any regulations relating to grade crossing safety pursuant to that statute, see CSX Pet. App. 10a-11a. Moreover, the court held, federal highway statutes and regulations addressing grade crossing safety are not so "pervasive * * * that we could fairly imply a congressional intent to pre-empt the field." CSX Pet. App. 11a. Alternatively, the court concluded that even if those regulations had some preemptive effect, Mrs. Easterwood's claims were not preempted because "[t]he record reflects that due to various financial con-

¹ There was no evidence that the warning devices in place at the Cook Street crossing had been installed with federal funds pursuant to the standards set forth in 23 C.F.R. 646.214(b). Cf. Affidavit of Wendall A. Hester ¶ 7 (Nov. 30, 1989) (stating that the circuitry at the Cook Street crossing was upgraded pursuant to a federally funded project to improve another grade crossing in Cartersville). The evidence showed that the Cook Street crossing had been surveyed by the State pursuant to the federal Rail-Highway Crossings Program (see pp. 6-10, *infra*), but that gate arms had not been installed. CSX Pet. App. 26a. It is unclear why gate arms were not installed. CSX claims that the Georgia Department of Transportation determined that gate arms might create traffic problems, Pet. 5, while the district court stated that the reason was that the "funds earmarked for [the installation of gate arms] were * * * transferred to other projects." CSX Pet. App. 26a.

straints and logistical problems, the state wanted to upgrade the site but was unable" to do so. *Id.* at 12a. The court concluded that "a policymaker's failure to act is insufficient to constitute preemption." *Ibid.*

2. Since the nineteenth century, state and federal authorities have sought effective methods of improving the safety of railway crossings. That traditionally occurred in three ways. First, States imposed common law and statutory tort duties on railroads requiring due care in the design and maintenance of grade crossings. See, e.g., *Grand Trunk R.R. v. Ives*, 144 U.S. 408, 416-420 (1892); *Continental Improvement Co. v. Stead*, 95 U.S. 161 (1877). Second, because railroads often needed to install warning devices on the public roadway in order to satisfy those duties, state authorities assumed an oversight role and required railroads to obtain state approval of such installations. Third, as automobile traffic increased, States and the federal government came to recognize greater public responsibility, and accordingly supplemented the railroads' efforts by funding safety improvements at rail crossings. Federal funds were authorized for this purpose as early as 1916. See Report of the Secretary of Transportation to Congress, *Rail-Highway Crossings Study 1-8* (1989) (1989 Report to Congress).

More recently, Congress responded to continuing concerns about crossing safety, and rail safety more generally, with the passage of two statutes of importance to this case: the Federal Railroad Safety Act of 1970 (FRSA), Pub. L. No. 91-458, 84 Stat. 971, codified as amended at 45 U.S.C. 421 *et seq.*, and the Highway Safety Act of 1973, Pub. L. No. 93-87, 87 Stat. 282, codified as amended at 23 U.S.C. 130. The question in this case is the extent to which these two statutes and the regulations implementing them altered the traditional scheme of regulation by preempting a railroad's state law duty to provide a reasonably safe grade crossing and to travel at a reasonable speed.

3. In 1970, Congress enacted the Federal Railroad Safety Act to "promote safety in all areas of railroad operations." 45 U.S.C. 421. To achieve those goals, FRSA vested the Secretary of Transportation with broad authority to prescribe rules governing rail safety.² 45 U.S.C. 431. In addition, FRSA specifically addressed the regulation of grade crossings by: (1) directing the Secretary to "undertake a coordinated effort toward the objective of developing and implementing solutions to the grade crossing problem," 45 U.S.C. 433(b); (2) requiring the Secretary to submit to Congress a comprehensive report recommending a program to improve grade crossing safety, 45 U.S.C. 433(a); and (3) directing the Secretary to issue "such rules, regulations, orders, and standards as may be necessary to ensure the safe maintenance inspection, and testing of signal systems and devices at railroad highway grade crossings." 45 U.S.C. 431(q), added by the Rail Safety Improvement Act of 1988, Pub. L. No. 100-342, § 23, 102 Stat. 639.

Congress addressed the role of the States in the regulatory scheme established by FRSA in two respects. First, the statute provides that States may participate in the regulatory enforcement of federal standards if they establish a state program and comply with certain reporting requirements. 45 U.S.C. 435(a).³ Second, the Act

² The Secretary has delegated general authority to promulgate rail safety rules and regulations under FRSA to the Federal Railway Administration (FRA). 49 C.F.R. 1.49(m). The Secretary has also delegated rulemaking authority to the Federal Highway Administration (FHWA) with respect to rules that also pertain to highway safety. See 49 C.F.R. 1.48(o), 1.49(m).

³ In cases where the Secretary has not brought enforcement proceedings arising out of a violation of federal regulations, a participating State is authorized to bring an enforcement action in federal district court seeking monetary fines (which cannot exceed \$20,000) or injunctive relief. 45 U.S.C. 436(a) and (b). If the Secretary determines that no violation occurred, however, the State is not permitted to bring such an action. 45 U.S.C. 436(a)(2) and (b)(2).

includes an express preemption provision. 45 U.S.C. 434. That provision states:

The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

Ibid.

4. Responding to FRSA's mandate, in 1971 and 1972 the Secretary submitted to Congress a comprehensive two-part report concerning the grade crossing problem. The report recommended that Congress address the problem of rail crossing safety through a vastly expanded federal funding project administered by the FHWA. See U.S. Dep't of Transportation, *Railroad-Highway Safety Part I: A Comprehensive Statement of the Problem* (1971) (1971 Report to Congress); U.S. Dep't of Transportation, *Railroad-Highway Safety Part II: Recommendations for Resolving the Problem* (1972) (1972 Report to Congress). In response, Congress passed the Highway Safety Act of 1973, Pub. L. No. 93-87, 87 Stat. 282, codified as amended at 23 U.S.C. 130, which established the Rail-Highway Crossings Program. That Program provides States with federal funds "for the elimination of the hazards of railway-highway crossings." 23 U.S.C. 130(a). To participate in the Rail-Highway Crossings Program, States must develop a program systematically

to identify dangerous railroad grade crossings and make them safe. The States must "maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose." 23 U.S.C. 130(d); see also 23 C.F.R. 924.9; 23 C.F.R. 1204.4, Highway Safety Program Guideline No. 12(G).

The Secretary, acting through the FRA and FHWA, has promulgated a series of regulations to implement the FRSA and the Rail-Highway Crossings Program. In 1971, FRA adopted rules establishing the maximum allowable operating speed for railroads travelling on all classes of track nationwide. 49 C.F.R. Pt. 213 and App. A; see also 49 C.F.R. 201.4, and recently adopted regulations prescribing reporting requirements for railroads relating to maintenance, inspection, and testing of grade crossing warning devices. 56 Fed. Reg. 33,722 (1991), to be codified at 23 C.F.R. Pt. 234.⁴

The FHWA has also adopted regulations governing the procedures States must follow in identifying hazardous crossings and implementing improvement projects with the use of federal funds under the Rail-Highway Crossings Program. The regulations set forth general principles to guide the "planning, implementation and evaluation of [highway] safety programs and projects." 23 C.F.R. 924.7. With respect to grade crossings, the regulations require that accident and traffic volume statistics, as well as other factors determining the relative hazards posed by different crossings, guide the prioritization and implementation of improvement projects. 23

⁴ The Secretary may enforce regulations promulgated under FRSA through issuance of compliance orders and assessment of civil penalties. 45 U.S.C. 437, 438. See also note 3, *supra*. Those orders are subject to enforcement in actions (in which injunctive relief is available) brought by the Attorney General in federal district court. See 45 U.S.C. 438-439. FRSA does not provide a private right of action to enforce its provisions.

C.F.R. 924.9(a). The States must also evaluate the costs and benefits of improvement projects, and make an annual report to FHWA regarding implementation of its program and the program's effectiveness in improving highway safety. 23 C.F.R. 924.13, 924.15.

The Secretary's regulations also establish specific standards governing the selection of warning devices installed with federal funds. 23 C.F.R. 646.214(b). For "any project where Federal-aid funds participate in the installation," the Secretary requires installation of "automatic gates with flashing light signals" whenever certain conditions exist at the crossing, such as "[h]igh speed train operation combined with limited sight distance." 23 C.F.R. 646.214(b)(3)(i).⁵ Where the specified conditions requiring automatic gates do not exist, "the type of warning device to be installed, whether the determination is made by a State regulatory agency, State highway agency, and/or the railroad, is subject to the approval of FHWA." 23 C.F.R. 646.214(b)(4).

Although the Rail-Highway Crossings Program is administered by the States, the regulations contemplate

⁵ The regulation lists the following conditions in which gate arms are required in order for the safety devices at a crossing to be adequate:

(A) Multiple main line railroad tracks.

(B) Multiple tracks at or in the vicinity of the crossing which may be occupied by a train or locomotive so as to obscure the movement of another train approaching the crossing.

(C) High Speed train operation combined with limited sight distance at either single or multiple track crossings.

(D) A combination of high speeds and moderately high volumes of highway and railroad traffic.

(E) Either a high volume of vehicular traffic, high number of train movements, substantial numbers of school-buses or trucks carrying hazardous materials, unusually restricted sight distance, continuing accident occurrences, or any combination of these conditions.

(F) A diagnostic team recommends them.

23 C.F.R. 646.214(b)(3)(i).

continued participation by railroads in the process of selecting and installing warning devices purchased with federal funds. See, e.g., 23 C.F.R. 646.216(b) (noting that the "preliminary engineering" for the decision may be done by the "railroad's engineering forces"); 1989 *Report to Congress* at 4-9. The regulations limit, however, the States' ability to require railroads to contribute to the cost of federally funded improvements. 23 C.F.R. 646.210(a).⁶

In addition to the regulations implementing the Rail-Highway Crossings Program, the Secretary has also issued standards governing the form and placement of all traffic control devices installed at all railway-highway grade crossings, regardless of whether federal funds are used in their installation.⁷ See 23 C.F.R. 646.214(b), 655.603. Those standards are set forth in the *Manual on Uniform Traffic Control Devices* (1988) (Manual or MUTCD), which the Secretary has incorporated into

⁶ 23 U.S.C. 130(b) and (c) provide that railroads are liable to the United States for the value of any benefit received as a result of federally funded grade crossing improvement projects. The Secretary determined, however, that such projects are generally "of no ascertainable net benefit to the railroads and there shall be no required railroad share of the costs." 23 C.F.R. 646.210(b)(1). That determination is consistent with the Department's longstanding practice of not permitting States to require railroads to contribute to the costs of crossings improvements if federal funds participate in the project. See, e.g., 23 C.F.R. 1.14(b) (1958). FHWA regulations permit, however, voluntary contributions by railroads to the cost of crossing improvements. 23 C.F.R. 646.210(d).

⁷ Federal funds are not used for all crossing improvements. The Secretary reported in 1989 that States and railroads spend approximately \$128 million per year on crossing improvement projects undertaken without federal participation. 1989 *Report to Congress* at 3-7, 3-8. In contrast to the more extensive federal regulation of improvements using federal funds, federal regulation of such projects is generally limited to the requirements of the MUTCD.

federal law. See 23 C.F.R. 655.601-655.603.⁸ With the exception that all crossings must be equipped at a minimum with a cross-buck warning sign, see MUTCD 8B-2;⁹ see also 23 U.S.C. 130(d), the Manual does not generally specify when particular safety devices are required. Instead, the Manual provides that such decisions should be based upon site-specific engineering judgment. See MUTCD 1A-4.

SUMMARY OF ARGUMENT

I. In FRSA, Congress established that a state law requirement relating to railroad safety may continue in force until the Secretary of Transportation issues regulations covering the subject matter of that state requirement. 45 U.S.C. 434. The issue in this case is whether regulations issued by the Secretary have covered the subject matter of (and hence preempted) a railroad's duty of care under state law to provide adequate warning devices at grade crossings and to travel at a reasonably safe speed. In our view, the Secretary has not issued regulations that totally preempt States from imposing duties of care on railroads relating to grade crossing safety. However, under regulations issued pursuant to the Rail-Highway Crossings Program, 23 U.S.C. 130, the Secretary has preempted States from imposing such duties with respect to grade crossings where the safety devices have been installed with the use of federal funds. With respect to the question of train speed, the Secretary has issued regulations comprehensively regulating the maximum speed at which trains may travel on every

⁸ The MUTCD provides uniform national standards for the form and placement of all traffic control devices on streets and highways nationwide. See MUTCD 1A-3. In 1977, the FHWA amended the MUTCD to address the form and placement of safety devices at grade crossings. See MUTCD Pt. VIII.

⁹ Other provisions of the Manual require that passive control devices, including advance warning signs and pavement markings, be placed at certain crossings. See MUTCD 8B-3, 8B-4.

mile of track nationwide, and has therefore preempted States from regulating that subject matter.

II. Both prior and subsequent to FRSA's enactment, Georgia law required railroads to share responsibility with state authorities to provide adequate warning devices at rail-highway grade crossings. Although state authorities have ultimate responsibility for determining the need and selection of safety devices at grade crossings, state law continues to require railroads to exercise due care in providing safe grade crossings. Nothing in FRSA or the Secretary's regulations changed the validity of that regime, except insofar as the safety devices at a grade crossing are improved using federal funds.

A. Courts that have embraced the broad preemption theory advanced by CSX have grounded their conclusions primarily in the MUTCD. The background and terms of the MUTCD do not, however, relieve railroads of the responsibility to participate in the improvement of unsafe grade crossings. The MUTCD states that it "provides standards for design and application of traffic control devices." MUTCD 1A-4. The MUTCD does not, however, purport generally to determine the circumstances in which particular safety devices are needed, leaving those decisions up to local engineering judgments. *Ibid.* Although the MUTCD states that "[t]he determination of need and selection of devices at a grade crossing is made by the public agency with jurisdictional authority," MUTCD 8A-1, there is no basis for interpreting that language as a federal directive relieving railroads of their pre-existing responsibilities to participate in the process of providing safe grade crossings. The Secretary, whose views on this matter are entitled to deference, has never construed the MUTCD as vesting in state agencies not only the *authority* to determine the need and selection of grade crossing safety devices, but the exclusive *duty* to do so as well.

B. Federal regulations implementing the Rail-Highway Crossings Program, 23 U.S.C. 130, do not generally

preempt States from imposing duties of care on railroads to provide adequate safety devices at grade crossings. One regulation, 23 C.F.R. 646.214(b), specifically mandates, however, the safety devices necessary for adequate warnings at crossings improved with the use of federal funds. That regulation lists particular circumstances in which gate arms are required, and mandates that the warning devices at crossings not requiring gate arms are subject to FHWA approval. In view of its comprehensive scope, we believe that 23 C.F.R. 646.214(b) covers the subject matter of adequate warning devices at federally funded grade crossings, and therefore preempts States from requiring more or different devices at such locations. We do not believe, however, that that regulation can be interpreted as covering the subject matter of safety devices at all grade crossings, regardless of whether they have been improved using federal funds. Such a sweeping reading of the regulation would be at odds with its language, which explicitly limits its application to federally funded projects.

C. In this case, Mrs. Easterwood's claim that the safety devices at the Cook Street crossing were inadequate is not preempted, because that crossing was not improved using federal funds pursuant to the Rail-Highway Crossings Program. The railroad's conduct with respect to the Cook Street crossing appears to have been entirely reasonable, but that is a state law question entirely distinct from the question whether Mrs. Easterwood's claim is preempted altogether.

III. Mrs. Easterwood alleges that CSX violated its common law duty to reduce its speed to accommodate unsafe conditions at the crossing. The Secretary has, however, adopted train speed regulations, 49 C.F.R. Pt. 213 that establish maximum rates of speed on every mile of track in the United States. Those regulations do not impose any duty on the railroad to reduce speed to accommodate other conditions. In our view, the court of

appeals correctly held that the Secretary's regulations cover the subject matter of the state requirement, and preempt any tort claim based upon violation of a state law standard.

The comprehensive character and underlying purposes of the regulations indicate that the Secretary has exhausted, or covered, the subject matter of train speed. The Secretary has concluded that reduced train speeds do not represent an appropriate method of preventing crossing accidents, and has instead focused on ensuring adequate lead time for warning vehicles approaching grade crossings. Local regulation of crossing speeds imposes unreasonable delays on the railways' interstate operations. Moreover, local regulation requiring trains continually to slow down as they approach grade crossings would increase the risks of derailment. Thus, not only have federal train speed regulations covered the subject matter of train speed so as to preempt state rules under FRSA, state regulation of speed is also preempted because of its interference with the full accomplishment of the federal purposes inherent in the Secretary's regulations. See *Gade v. National Solid Wastes Management Ass'n*, 112 S. Ct. 2374, 2383 (1992).

ARGUMENT

I. STATE LAW REQUIREMENTS RELATING TO RAIL SAFETY ARE NOT PREEMPTED BY FRSA UNLESS THE SECRETARY HAS ADOPTED REGULATIONS COVERING THE SAME SUBJECT MATTER AS THE STATE REQUIREMENT AT ISSUE

The principles governing preemption analysis are well established. State law is preempted under the Supremacy Clause, U.S. Const. Art. VI, Cl. 2, when Congress expressly so provides. See, e.g., *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2617-2618 (1992); *Gade v. National Solid Wastes Management Ass'n*, 112 S. Ct. 2374, 2381-

2383 (1992); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983).¹⁰ In every case, whether state law is preempted turns on congressional intent. Where, as here, a lawfully promulgated agency regulation is at issue, its preemptive scope is similarly determined by the intent of the issuing authority. *FMC Corp. v. Holliday*, 111 S. Ct. 403, 407 (1990); *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 714 (1985); *Fidelity Federal Savings & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 154 (1982).

The Court has made clear, however, that "[c]onsiderations of issues arising under the Supremacy Clause starts with the assumption," *Cipollone*, 112 S. Ct. at 2617 (internal quotation removed), that preemption is not to be found in fields traditionally regulated by the States under the historic police power "unless that was the clear and manifest purpose of Congress." *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. at 715 (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) and *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Providing compensatory remedies through the mechanism of the tort system is undoubtedly within the States' historic police power, see, e.g., *Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290, 304 (1977); *Cipollone*, 112 S. Ct. at 2617-2618, and Georgia has historically required railroads to exercise reasonable

¹⁰ In the absence of express preemption, preemption will nonetheless be implied when it is clear that Congress intended federal regulation of a field to be exclusive. See, e.g., *English v. General Electric Co.*, 496 U.S. 72 (1990); *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983). Finally, state law is preempted to the extent that it actually conflicts with federal law. Such a conflict is present where it is impossible to comply with both federal and state requirements (see *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963)), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Gade*, 112 S. Ct. at 2383.

care to make crossings safe. See, e.g., *Macon & Western R.R. v. Davis*, 18 Ga. 679 (1855). Thus, Mrs. Easterwood's claims are presumed not to be preempted, and CSX bears the burden of establishing otherwise. Under this Court's recent decision in *Cipollone*, moreover, that presumption is not overcome by the fact that this is an express preemption case. See *Cipollone*, 112 S. Ct. at 2618; see also *id.* at 2625-2626 (Blackmun, J., concurring).

The claim of preemption in this case rests on Section 434 of FRSA, which states that railroad safety regulation shall be nationally uniform to the extent practicable. That statute expressly defines the scope of state authority to regulate railroad safety. State law requirements "relating to railroad safety" may continue in force "until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement." 45 U.S.C. 434.¹¹ Whether a state law is preempted under FRSA thus turns on whether the Secretary has adopted a rule, regulation, order or standard "covering the subject matter of such State requirement." 45 U.S.C. 434. To the extent that the Secretary has done so, the State may not continue to enforce its requirement; rather, the Secretary's regulation is substituted as the governing rule.

The statutory language suggests that the Secretary's regulations should be found to "cover" the subject matter of a state rule in either of two ways. First, if the specific requirement imposed on the railroad by the State has also been addressed by the Secretary, it is appropriate to conclude that the Secretary has "covered" the

¹¹ FRSA's express preemption is limited by an exception providing that state regulation of a matter covered by federal regulation is permitted if necessary "to eliminate or reduce an essentially local safety hazard," and if it neither unduly burdens interstate commerce nor conflicts with federal regulations. 45 U.S.C. 434. We agree with the court of appeals, CSX Pet. App. 6a n.3, that the local hazard exception is not applicable in this case.

subject of the state requirement. As we argue at point III below, we believe that to be the case with respect to Mrs. Easterwood's allegations of excessive train speed. Second, even if the Secretary has not addressed the specific state requirement, preemption should nevertheless be found if federal regulations deal broadly and substantially with—in effect, occupy the field of—the state law requirement at issue. See *Missouri Pacific R.R. v. Railroad Comm'n of Texas*, 833 F.2d 570, 574-575 & n.5 (5th Cir. 1987) (state regulation is preempted under Section 434 only if it would impair or supplement a federal scheme that “superintends” a particular safety hazard). In other words, only if the Secretary has regulated comprehensively in an area is it fair to conclude that he did not intend to subject the railroads to any further State requirements.¹² In addition, because Congress has vested the Secretary with authority to determine when state regulation of rail safety issues should be superimposed by federal regulations, the stated intent of the Secretary concerning the preemptive scope of the regulations should be dispositive. See *Hillsborough County*, 471 U.S. at 714-715.¹³

¹² Because FRSA makes the Secretary's rules, regulations or orders preemptive if they cover the subject matter of a state requirement, we do not believe that any statement of preemptive intent on the part of the Secretary is necessary for a regulation to be preemptive. Cf. *Hillsborough County*, 471 U.S. at 717 (because agencies frequently issue detailed regulations, implied preemption will rarely be found on the basis of comprehensiveness of agency regulations.) That does not mean, however, that the Secretary's own views of the preemptive scope of his regulations are not to be respected, or that the statutory term “cover” should not be given its ordinary meaning. See *Webster's Third New International Dictionary* 524 (1986) (defining the verb “cover” as “to comprise, include, or embrace in an effective scope of treatment or operation”). Cf. *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2037 (1992) (statute preempting state laws “relating to” airline rates is broadly preemptive).

¹³ The Secretary has specifically stated his preemptive intent on occasion. In regulations dealing with drug testing of railroad

II. FEDERAL LAW HAS NOT PREEMPTED ALL STATE LAW DUTIES ON RAILROADS TO MAINTAIN SAFE GRADE CROSSINGS, BUT HAS PREEMPTED SUCH DUTIES AT GRADE CROSSINGS IMPROVED USING FEDERAL FUNDS

Prior to FRSA's adoption, there is no question that States and railroads shared “joint responsibility” for ensuring the reasonable safety of grade crossings, and both were generally subject to tort damages for injuries sustained at unsafe crossings. *1989 Report to Congress* at 1-7, 1-8, 7-5. Public funds were used to finance improvements, and state highway authorities retained ultimate authority over the selection and installation of warning devices. CSX has not suggested that under this pre-FRSA regime, railroads were somehow released from their common law obligations, or that any inherent conflict existed between that scheme and maintenance of common law duties. The practical effect of that regime was this: The railroad generally was required to identify hazardous crossings, participate in the selection and design of appropriate warning devices, seek approval to install such devices on the public right of way, and fund the cost of necessary upgrades to the extent public funds were unavailable.¹⁴

employees, for example, the Secretary expressly limited the scope of preemption so as not to reach generally applicable state criminal laws. See 49 C.F.R. 219.213(b).

¹⁴ Both before and after FRSA's enactment, the States generally maintained a dual system of responsibility for safety at grade crossings. See, e.g., *Clifton v. Southern Pac. Transp. Co.*, 709 S.W.2d 636, 641 (Tex. 1986) (even though public agency had duty to provide warning devices, railroad “had a duty to report” the dangerous condition “and see that it was” rectified); *Stromquist v. Burlington Northern, Inc.*, 444 N.E.2d 1113, 1116 (Ill. App. 1983) (regardless of whether public agency with authority had ordered installation of safety devices, railroad retained common law duty to provide adequate warning devices); *Decker v. Norfolk & Western R.R.*, 265 N.W.2d 785, 787 (Mich. Ct. App.) (same), appeal denied, 403 Mich. 845 (1978); *Perkins v. National*

The basic issue with respect to the grade crossing claim in this case is whether regulations adopted by the Secretary after FRSA's enactment absolved railroads of their common-law duties to participate in the process of providing safe grade crossings to the public, and to conduct those activities with due care. In our view, Section 434 of FRSA compels the conclusion that federal regulations supplant that duty in part, namely in the circumstances addressed in federal regulations, 23 C.F.R. 646.214(b), covering the selection of warning devices where those devices are installed with federal funds. Beyond those circumstances, however, we do not believe federal grade crossing regulations cover the entire subject matter of a railroad's duty to provide a reasonably safe grade crossing.

A. The MUTCD Does Not Oust The States' Traditional Police Power To Require Railroads To Provide Safe Grade Crossings

Courts embracing the broad preemption theory advanced by CSX have grounded their conclusions primarily in the Manual. See, e.g., *Hatfield v. Burlington Northern R.R.*, 958 F.2d 320 (10th Cir. 1992), petition for cert. pending, No. 91-1977; *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149 (9th Cir. 1983). The Manual's background¹⁵ and nature suggest, however, that it does not—

R.R. Passenger Corp., 289 N.W.2d 462, 466-467 (Minn. 1979) (same).

¹⁵ The Manual was initially issued in 1935 by the Federal Highway Administration (FHWA) in response to congressional directives to develop uniform standards for traffic signal and other warning devices installed on federally assisted highway projects. 23 U.S.C. 109(d); U.S. Dep't of Transportation, *Traffic Control Devices Handbook* 1-2 (1983). In 1974, the Code of Federal Regulations was amended to incorporate the MUTCD into federal law by reference, see 23 C.F.R. 625.3, 655.601 (1974). See also 23 C.F.R. 655.601-655.603 (1991) (noting that the MUTCD, as amended through March 1989, is "the national standard for all traffic control devices").

either directly or by implication—relieve railroads of the responsibility to participate in the improvement of unsafe grade crossings.

1. The Manual expressly states that it "provides standards for the design and application of traffic control devices." The Manual does not, however, purport generally to determine the circumstances in which a particular safety device is needed. To the contrary, the MUTCD states that "[t]he decision to use a particular device at a particular location should be made on the basis of an engineering study of the location." MUTCD 1A-4.¹⁶

CSX maintains, however, that the MUTCD vests exclusive responsibility for initiating and selecting crossing safety improvements in state agencies with jurisdiction over highways. CSX relies on Part VIII of the MUTCD, which was added in 1977 to set forth uniform standards covering the appearance and placement of signs and other safety devices at grade crossings. See U.S. Dep't of Transportation, Federal Highway Administration, Federal Highway Administration Bulletin (Apr. 1, 1977).¹⁷

¹⁶ See also MUTCD 8D-1 ("Due to a large number of * * * variables * * * there is no single standard system [to determine appropriate traffic control devices] at grade crossings. Based on an engineering * * * investigation, a determination is made whether any active traffic control system is required at a crossing and, if so, what type is appropriate.").

¹⁷ The MUTCD was incorporated into federal law by the FHWA, not the FRA, and the agency did not rely upon statutory authority under FRSA in promulgating the Manual. The court of appeals therefore concluded that the express preemption provisions of Section 434 were not implicated. See CSX Pet. App. 10a-11a. In our view, that was error. The plain language of Section 434 refers to *any* regulation adopted by the Secretary of Transportation, without any qualification as to the issuing authority or source of statutory authorization. Thus, regulations adopted by the Secretary pursuant to federal highway legislation trigger FRSA's express preemption if a State regulation "relate[s] to railroad safety" and the Secretary's regulations "cover[] the subject matter" of the state law requirement at issue. 45 U.S.C. 434. We took that posi-

That portion of the MUTCD, however, does not bear such a sweeping interpretation.

Section 8A-1 of the Manual states:

[T]he highway agency and the railroad company are entitled to jointly occupy the right-of-way in the conduct of their assigned duties. This requires joint responsibility in the traffic control function between the public agency and the railroad. The determination of need and selection of devices at grade crossings is made by the public agency with jurisdictional authority. Subject to such determination and selection, the design, installation and operation shall be in accordance with the national standards contained herein.

The crucial sentence in this paragraph—which states that “[t]he determination of need and selection of devices at grade crossings is made by the public agency with jurisdictional authority”—merely describes the process that has long governed the selection of traffic control devices.¹⁸ Even though railroads have long been subject to a common law duty to identify hazardous crossings, and to initiate efforts to make them safe, a public agency ordinarily has final authority to determine what traffic control devices may be installed on public roadways.¹⁹ There

tion in our brief *amicus curiae* urging the Court to deny certiorari in *Public Utilities Comm’n v. CSX Transp., Inc.*, cert. denied, 111 S. Ct. 781 (1991).

¹⁸ Although paragraph 8A-1 is merely descriptive, another section of the MUTCD does require public authorities to retain final approval authority over the installation of any traffic control device. See MUTCD 1A-3.1 (“Traffic control devices shall be placed only by the authority of a public body or official having jurisdiction.”).

¹⁹ As a matter of state law, the fact that a public agency participates in the selection process and has a duty of care does not ordinarily relieve a railroad of the same duty. See *e.g.*, *Southern Ry. v. Georgia Kraft Co.*, 373 S.E.2d 774 (Ga. Ct. App. 1988); *Wright v. Dilbeck*, 176 S.E.2d 715 (Ga. Ct. App. 1970). See also

is, accordingly, no reason to interpret this sentence as a federal directive that relieved railroads of their pre-existing responsibilities to participate in the process of providing safe grade crossings.²⁰ In short, the MUTCD does not “determin[e] the duties and responsibilities of a railroad with respect to the safety of grade crossings.” *Runkle v. Burlington Northern*, 613 P.2d 982, 990 (Mont. 1980).

2. The Department of Transportation has never construed the MUTCD as abandoning the common law of “joint responsibility” in favor of a scheme vesting in States the exclusive duty to provide adequate warning devices at grade crossings. The Department’s interpretive guide to the MUTCD explains that “the highway engineer and railroad engineer will [often] share responsibility to select appropriate traffic control devices] at the grade crossing. The extent of their responsibilities will vary depending upon State law and practices; however, both must be involved in the decision-making process.” U.S. Dep’t of Transportation, *Traffic Control Devices Handbook* 8-1 (1983). The 1989 report submitted to Congress by the Secretary further confirms that the regime of joint responsibility for grade crossing improvements has not been displaced by federal regulations, and continues to this day. See *1989 Report to Congress* at 3-1 (stating that “responsibilities at crossings are not well defined, nor specifically assigned to various parties” because they are “shared”).²¹

²⁰ 91 A.L.R. 2d § 11, at 58-59 (1963) (collecting cases); note 14, *supra*. Thus, there is no inherent conflict between the need to gain public approval of a grade crossing improvement and a common law duty to seek that approval when circumstances warrant.

²¹ Indeed, the Manual affirmatively contemplates that railroads will have occasion to seek installation of new or modified traffic control devices at grade crossings. See MUTCD 8D-1.

²² See also *1989 Report to Congress* at 1-8 (noting that the Interstate Commerce Commission recommended in the early 1960’s (see *Prevention of Rail-Highway Grade Crossing Accidents In-*

That view of the responsible agency is, we submit, entitled to deference. See *Hillsborough County*, 471 U.S. at 714; *Arkansas v. Oklahoma*, 112 S. Ct. 1046, 1059 (1992); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984). In view of its nature and scope, and the Secretary's consistent construction of its import, the MUTCD cannot be said to "cover" the subject matter of a railroad's responsibility to provide a safe grade crossing.²² It therefore does not preempt States from continuing to impose such duties.²³

cluding Railway Trains and Motor Vehicles, 322 I.C.C. 1 (1964)) that the public should have sole responsibility to finance grade crossing projects but that "[t]his philosophy was never totally accepted").

²² State imposition of joint responsibility for improvement of grade crossings also does not conflict with the MUTCD requirements. As noted, our view is that the Manual did nothing to alter the preexisting common law allocations of responsibility at grade crossings, nor was there ever thought to be any conflict in that regime. The prospect of tort liability may induce a railroad to develop and implement its own plans for monitoring and improving its grade crossings, which is of course consistent with the overarching Congressional goal of improving grade crossing safety. See 45 U.S.C. 421. Federal interests in promoting uniformity and comprehensive state planning are fully protected by simply requiring such private initiatives to be reviewed and approved by the appropriate state agency before any work may commence. That, in short, is precisely what the MUTCD does.

²³ States may adopt their own version of the MUTCD in lieu of the federal version (so long as the state version substantially complies with the federal), see 23 C.F.R. 655.603(b). To conclude that the MUTCD constituted a delegation of federal decisionmaking authority to the States with an implied condition that States surrender their traditional common law duties of care, one would also have to reach the untenable conclusion that a State, in adopting its own version of the MUTCD, had no choice but implicitly to revoke its traditional tort law.

B. The Regulations Implementing the Rail-Highway Crossings Program Do Not Entirely Preempt State Law Duties Of Care, But Do Preempt States From Requiring Railroads To Provide More Or Different Safety Devices At Crossings That Are Improved Using Federal Funds

In our view, the regulations implementing the Rail-Highway Crossings Program do not completely oust railroads from their state law duties of care. The Secretary's regulations do, however, cover the subject matter of adequate safety devices at crossings that have been improved with the use of federal funds. In particular, 23 C.F.R. 646.214(b) is unique among the Secretary's regulations in that it establishes substantive standards for what constitutes adequate safety devices on grade crossing improvement projects financed with federal funds. Section 646.214(b)(2) expressly states that before any grade crossing within a federally funded highway project is opened for use (or the project accepted by the FHWA), "adequate warning devices for the crossing [must be] installed and functioning properly." 23 C.F.R. 646.214(b)(2). Section 646.214(b)(3)(i) in turn defines what constitutes adequate warning devices. That subsection provides that adequate warning devices

under § 646.214(b)(2) or on any project where Federal-aid funds participate in the installation of the devices are to include automatic gates with flashing light signals when one or more of the following conditions exist * * *.

23 C.F.R. 646.214(b)(3)(i).²⁴ The regulation continues by providing that for crossings not requiring gate arms under subsection 646.214(b)(3), "the type of warning device to be installed, whether the determination is made by a State regulatory agency, State highway agency,

²⁴ As noted above, see note 5, *supra*, the regulation then lists specific conditions requiring the installation of gate arms.

and/or the railroad, is subject to the approval of FHWA." 23 C.F.R. 646.214(b)(4).²⁵

The scope of 23 C.F.R. 646.214(b) indicates that *for federally funded projects* the Secretary has covered the subject matter of what safety devices are appropriate. The regulation requires gate arms in certain circumstances, and requires FHWA approval of the safety devices in all other circumstances. Thus, the warning devices in place at a crossing improved with the use of federal funds have, by definition, been specifically found to be adequate under a regulation issued by the Secretary. Any state rule that more or different crossing devices were necessary at a federally funded crossing is therefore preempted.²⁶

Neither the preemption effected by 23 C.F.R. 646.214(b), nor anything else in the Rail-Highway Crossings Program, however, provides a basis for concluding that railroads are relieved from their duty of care in all circumstances.²⁷ In the absence of a clear statement of preemption, mere participation in the Program should not require the States to give up their traditional police powers; there

²⁵ We note in passing that this regulation—in affirmatively contemplating that railroads might play a role in determining when particular crossing devices are necessary—is further evidence that the MUTCD did not preempt the States from imposing a duty of care on railroads to participate in the process.

²⁶ Such claims might not be preempted, however, to the extent that the plaintiff alleged that the railroad negligently participated in a violation of the standards set forth in 23 C.F.R. 646.214(b), or that changed circumstances rendered the crossing unsafe. Here, no such claims were made.

²⁷ Aside from 23 C.F.R. 646.214(b), numerous federal regulations impose procedural conditions on the use of federal funds to improve grade crossings. The Rail-Highway Crossings Program requires the States to implement a program to survey grade crossings and implement improvement projects, and prescribes factors to be considered in that process. See 23 U.S.C. 130; 23 C.F.R. Pts. 646, 655, 924. We see no reason to infer from that scheme that a state law "requirement" that railroads participate in that process was displaced by silence.

is, accordingly, no basis for concluding that the regulations preempt tort law beyond the specific circumstances in which federal funds have been used to improve a crossing. See *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1 (1981).²⁸

By their express terms, the Secretary's regulations do not apply to crossings improved without the use of federal funds. See 23 C.F.R. 646.214(b)(3)(i) (specifying "adequate warning devices" for "any project where Federal-aid funds participate in the installation of the devices"); 23 C.F.R. 646.210(a) (State laws "requiring railroads to share in the cost" of improvements "shall not apply to Federal-aid projects."). See also *1989 Report to Congress* at 3-2. And the regulations do not have any impact with respect to crossings that are not improved at all.²⁹ Thus, we agree with the court of appeals that the

²⁸ The conclusion that state tort law has not been wholly ousted is further confirmed by 23 U.S.C. 409, which limits the discovery and evidentiary use of "reports, surveys, schedules, lists, or data compiled for the purpose of identifying, evaluating, or planning, the safety enhancement of * * * railway-highway crossings, pursuant to section [] 130 * * * of this title."

The obvious premise of the statute is that claims against railroads have *not* been wholly preempted. Section 409 may pose practical problems in litigating grade crossing tort claims by excluding certain types of probative evidence. Like all rules of privilege, however, the statute reflects a policy judgment that the costs of exclusion are outweighed by the benefits. Moreover, the statute does not appear to bar all forms of proof relating to the railroad's performance of state law duties, but only certain categories of data and reports.

²⁹ The limited preemption that we suggest is further supported by the history of the funding program. The Secretary's reports to Congress confirm that the Rail-Highway Crossings Program was intended to continue the tradition of *supplementing*—but not entirely displacing—the railroads' common law tort responsibility for providing adequate warning devices. First, the study conducted by the Secretary in 1971 observed that railroads had traditionally assumed substantial responsibility for grade crossing safety, see *1971 Report to Congress* at 18-19, A30-A31, but the final report submitted to Congress in 1972, while calling for a

Rail-Highway Crossings Program—which requires the States to survey crossings and prioritize possible improvement projects—does not “explicitly or implicitly” suggest that a railroad has *no* responsibility to identify hazardous crossings and to provide necessary improvements when federal funds have not been allocated for that purpose. CSX Pet. App. 11a.³⁰

C. The Grade Crossing Claim Is Not Preempted Because There Is No Evidence That The Cook Street Crossing Was Improved Using Federal Funds

Mrs. Easterwood is not seeking to hold CSX liable for violation of the specific state law requirements covered by the Secretary’s regulations, namely the selection of

uniform and national approach for crossing improvements, did not recommend termination of the railroads’ involvement in the improvement process. More recently, the Secretary described “the Federal role in crossing improvements” as “primarily one of funding projects, and ensuring that Federal dollars are appropriately spent.” *1989 Report to Congress* at 1-7. The Report recognized that railroads are held liable for damages arising from the train-motor vehicle accidents at crossings. *Id.* at 7-5. After considering current financing mechanisms for the improvement of grade crossings, however, the Secretary recommended no changes in existing programs. *Id.* at 8-7.

³⁰ This conclusion is further underscored by the fact that such categorical preemption would leave substantial areas of railroad conduct essentially unregulated, despite the Secretary’s recognition of the railroads’ critical role in the improvement of grade crossing safety. For example, the Secretary has emphasized that “[p]rompt identification” of “hazardous conditions” on an individual crossing remains “a key element in addressing crossing safety.” *1989 Report to Congress* at 8-7. Railroads are often first to know about such changing hazards, because changes in the railroad’s “traffic volumes and speeds” necessitate further review of crossing safety “to adapt existing warning systems to the new conditions.” *Id.* at 1-2. Rather than inferring that the Secretary made a silent judgment that railroads ought to have no duty to report such information to State authorities and recommend appropriate changes, it is far more reasonable to conclude that the Secretary’s regulations simply did not cover this and many other requirements of due care traditionally imposed by state law.

adequate warning devices where crossing improvements are made with the use of federal funds. Rather, Mrs. Easterwood’s claim is simply that CSX was negligent in failing to install gate arms at the Cook Street crossing. The railroad countered that local authorities refused to install gate arms in order to avoid interference with traffic patterns. See Pet. 5. If CSX’s version of the facts is correct, it does not appear that there could be any basis for a finding of negligence on the part of the railroad.

The question of negligence, however, is obviously distinct from the issue of preemption. No regulation of the Secretary addresses the duty of the railroad to improve the safety of a grade crossing when the State decides not to utilize limited federal funds for that purpose.³¹ As we have discussed, there is also no basis for concluding that the subject of this state requirement was covered through thorough regulation of crossing safety. In the absence of facts suggesting that the plaintiff is challenging specific conduct that was the subject of federal requirements, the claim is not preempted.

III. STATE LAW REQUIREMENTS CONCERNING TRAIN SPEED ARE PREEMPTED BY FRSA BECAUSE THE SECRETARY HAS ADOPTED REGULATIONS COVERING THE SUBJECT MATTER OF TRAIN SPEED

A. Mrs. Easterwood alleges that under Georgia common law, the railroad had a duty to reduce its speed to

³¹ We do not believe that a State’s decision not to upgrade a crossing can be characterized as an affirmative federal decision that the safety devices at that crossing are adequate. Thus, this is not an instance in which a federal regulator’s failure to act represents an affirmative decision that is itself preemptive. See *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978); *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767 (1947). The courts that have taken the opposite view have premised their conclusion on the untenable ground (see pp. 19-22, *supra*) that the MUTCD represents a delegation of federal authority to States. See, e.g., *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149, 1154 (9th Cir. 1983).

accommodate unsafe conditions at the crossing. See, e.g., *Central of Georgia R.R. v. Markert*, 410 S.E.2d 437, 438 (Ga. Ct. App. 1991). The Secretary has, however, adopted train speed regulations, 49 C.F.R. Pt. 213, that establish maximum rates of speed on every mile of track in the United States. Those regulations do not impose any duty on the railroad to reduce speed to accommodate other conditions. In our view, the court of appeals correctly held that the Secretary's regulations cover the subject matter of the state requirement and thus preempt any tort claim based upon violation of a state law standard.

B. The benchmark for train speed regulation chosen by the Secretary is the physical characteristics of the track. Thus, maximum permissible train speeds are determined based on a variety of factors, including the type of surface, structure, geometry, curvature, and elevation of the track. 49 C.F.R. 213.57, 213.59.³² Significantly, federal regulations set the maximum speed permitted on every mile of track throughout the country.³³ The regulations thus specifically address the question of how fast CSX is permitted to travel at the precise location of the accident at issue in this case.

³² The regulations establish six classes of track, and set a maximum speed for each class. For example, class 6 track, which carries the highest train speed limit, must meet tolerances for track gage (49 C.F.R. 213.53), track alignment (49 C.F.R. 213.55), track surface (49 C.F.R. 213.63), and the number of crossties in a defined length of track (49 C.F.R. 213.109). Thus, the regulations take into account the full range of physical characteristics of track.

³³ FRA has also regulated the subject of train speed in other, more limited, contexts. FRA's train signal regulations, 49 C.F.R. Pt. 236, limit train speeds based on both the type of railroad signal system in use and type of railroad operation itself. Other regulations, 49 C.F.R. 240.305, impose substantial penalties on an engineer who exceeds by more than 10 miles per hour the speed limit set by a railroad within the limits set by FRA. FRA has further regulated speed in the context of movement of defective freight cars for repairs, 49 C.F.R. 215.9, and movement of non-complying locomotives, 49 C.F.R. 229.9, and in the context of "blue

The comprehensive character and underlying purposes of the regulations indicate that the Secretary sought to exhaust—or "cover"—the subject matter of train speed. The Secretary has concluded that reduced train speeds do not represent an appropriate method of preventing crossing accidents, *1989 Report to Congress* at 5-10, and has indicated that these regulations govern train speed regardless of grade crossing conditions. *Id.* at 4-10 (stating with respect to operating procedures at crossings that "maximum train speeds are established by the individual railroads in accordance with federal track and signal standards" and that "[c]ourts have ruled that State or local laws on train speeds are preempted by Federal regulations.") Instead, the Secretary has sought to foster grade crossing safety by ensuring adequate lead time for warning vehicles approaching grade crossings. See MUTCD 8C-5. In view of their comprehensive nature and the fact that they directly regulate the same subject as a state requirement that a train travel at a reasonable speed, we believe that the Secretary's train speed regulations "cover" the subject matter of train speed. Accordingly, such state requirements are preempted under FRSA.

Putting aside the question of express preemption under FRSA, Mrs. Easterwood's train speed claim is preempted because of a conflict with the federal regime. State regulation supplementing the comprehensive federal scheme, which unambiguously establishes maximum speeds on all tracks nationwide, would frustrate both the congressionally mandated goal of uniform regulation, see

signal protection" of railroad workers, 49 C.F.R. 218.29. FRA also restricts locomotives not equipped with a speed indicator to speeds of less than 20 miles per hour, 49 C.F.R. 229.117. Finally, FRA has also addressed the speed of trains as particular safety hazards not covered by the general regulations may require. For example, in recognition of "substantial and constant risk to the health and safety of the public," FRA imposed a 30-mile per hour speed limit on hazardous materials transportation conducted by an entire railroad. FRA Emergency Order No. 11, 44 Fed. Reg. 8402 (1979).

45 U.S.C. 434, and the safety concerns underlying federal speed regulations. Local regulation of crossing speeds imposes unreasonable delays on the railroads' interstate operations, and can increase the risk of derailment. *1989 Report to Congress* at 5-10 (a train in an "emergency braking situation is subject to derailing"). As a result, state requirements pertaining to train speed are preempted, because such requirements frustrate the balance between speed and safety drawn in the federal regulations. See *Gade v. National Solid Wastes Management Ass'n*, 112 S. Ct. 2374, 2383 (1992) (state law preempted if it interferes with the full accomplishment of the federal scheme's purposes); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (same).

CONCLUSION

The judgment of the court of appeals in both No. 91-790 and No. 91-1206 should be affirmed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

WALTER B. MCCORMICK, JR.
General Counsel

MAUREEN E. MAHONEY
Deputy Solicitor General

PAUL M. GEIER
*Assistant General Counsel
for Litigation*

WILLIAM K. KELLEY
*Assistant to the Solicitor
General*

DALE C. ANDREWS
*Deputy Assistant General
Counsel for Litigation
Department of Transportation*

WILLIAM KANTER
JEFFREY CLAIR
Attorneys

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1992

CSX TRANSPORTATION, INC.,

Petitioner,

v.

LIZZIE BEATRICE EASTERWOOD,

Respondent.

LIZZIE BEATRICE EASTERWOOD,

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v.

CSX TRANSPORTATION, INC.,

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**On Writs of Certiorari to the
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for the Eleventh Circuit**

**BRIEF AMICUS CURIAE OF
NATIONAL RAILROAD PASSENGER CORPORATION
IN SUPPORT OF PETITIONER/CROSS-RESPONDENT
CSX TRANSPORTATION, INC.**

Stephen C. Rogers
Charles E. Mandolia
National Railroad Passenger
Corporation
60 Massachusetts Avenue, N.E.
Washington, D.C. 20002
(202) 906-3995

Paul F. Mickey, Jr.*
Alvin Dunn
Shaw, Pittman, Potts &
Trowbridge
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000

Counsel for Amicus

August 27, 1992

*Counsel of Record

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
STATUTORY AND REGULATORY BACKGROUND	7
Statutory Framework	7
The Secretary's Railroad Safety Regulations	8
SUMMARY OF ARGUMENT	12
ARGUMENT	13
I. FEDERAL LAW PREEMPTS MRS. EASTERWOOD'S SPEED CLAIM	13
A. The Secretary of Transportation Has Promulgated Regulations That Cover the Subject Matter of Train Speeds Through Grade Crossings	15
B. The State Common Law Rule Mrs. Easterwood Seeks to Enforce Does Not Fit Within the Savings Provision of Section 434	17
1. The Rule Mrs. Easterwood Seeks to Enforce Does Not Address a "Local Safety Hazard" Within the Meaning of Section 434	18
2. The Rule Mrs. Easterwood Seeks to Enforce Would Be Incompatible with the Secretary's Speed Regulations	20
CONCLUSION	23

TABLE OF AUTHORITIES

Cases	Page
<i>Allis-Chalmers Corp. v. Lueck</i> , 471 U.S. 202 (1985)	13
<i>Central of Georgia Railroad Co. v. Markert</i> , 410 S.E.2d 437 (Ga. App.), cert. denied, 200 Ga. App. 895 (1991)	21
<i>Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.</i> , 450 U.S. 311 (1981)	15
<i>Cipollone v. Liggett Group, Inc.</i> , 112 S. Ct. 2608 (1992)	13, 14, 15
<i>Consolidated Rail Corp. v. Smith</i> , 664 F. Supp. 1228 (N.D. Ind. 1987)	3
<i>Easterwood v. CSX Transportation, Inc.</i> , 933 F.2d 1548 (11th Cir. 1991), cert. granted, 112 S. Ct. 3024 (1992)	passim
<i>Florida East Coast Railway Co. v. Griffin</i> , 566 So. 2d 1321 (Fla. Dist. Ct. App. 1990)	21
<i>Florida Lime & Avocado Growers, Inc. v. Paul</i> , 373 U.S. 132 (1963)	16
<i>FMC Corp. v. Holliday</i> , 111 S. Ct. 403 (1990)	13
<i>Hillsborough County v. Automated Medical Laboratories, Inc.</i> , 471 U.S. 707 (1985)	13
<i>Hines v. Davidowitz</i> , 312 U.S. 52 (1941)	13
<i>Illinois v. City of Milwaukee</i> , 406 U.S. 91 (1972)	14
<i>Ingersoll-Rand Co. v. McClendon</i> , 111 S. Ct. 478 (1990)	13
<i>International Paper Co. v. Ouellette</i> , 479 U.S. 481 (1987)	15

	Page
<i>Johnson v. Southern Railway Co.</i> , 654 F. Supp. 121 (W.D.N.C. 1987)	17, 18
<i>Jones v. Rath Packing Co.</i> , 430 U.S. 519 (1977)	22
<i>Lara v. National Railroad Passenger Corp.</i> , No. CIV. H. 85-697, 1986 WL 15725 (N.D. Ind. May 27, 1986)	3
<i>Morales v. TWA</i> , 112 S. Ct. 2031 (1992)	13, 14
<i>Napier v. Atlantic Coast Line Railroad Co.</i> , 272 U.S. 605 (1926)	16
<i>National Railroad Passenger Corp. v. City of Everett</i> , No. C89-834R (W.D. Wash. Oct. 4, 1989)	3
<i>National Railroad Passenger Corp. v. Town of Broussard</i> , Civ. No. 91-0012 (W.D. La. July 2, 1992)	3
<i>National Railroad Passenger Corp. v. Township of Pennsauken</i> , Civ. No. 89-1552 (D.N.J. Oct. 30, 1989)	3
<i>Norfolk & Western Railway Co. v. American Train Dispatchers Ass'n</i> , 111 S. Ct. 1156 (1991)	14
<i>Rice v. Santa Fe Elevator Corp.</i> , 331 U.S. 218 (1947)	13
<i>San Diego Building Trades Council v. Garmon</i> , 359 U.S. 236 (1959)	15
<i>Sisk v. National Railroad Passenger Corp.</i> , 647 F. Supp. 861 (D. Kan. 1986)	3
<i>Southern Pacific Transportation Co. v. St. Charles Parish Police Jury</i> , 569 F. Supp. 1174 (E.D. La. 1983)	3, 4, 18

	Page
<i>Southern Pacific Transportation Co. v. Town of Baldwin</i> , 685 F. Supp. 601 (W.D. La. 1987)	3
Constitutions	
U.S. Const. art. I, § 8, cl. 3	17
Statutes	
Department of Transportation and Related Agencies Appropriations Act, 1992, Pub. L. No. 102-143, 105 Stat. 917 (1991)	2
Federal Railroad Safety and Hazardous Materials Transportation Control Act, 45 U.S.C. §§ 421-445 (1988)	7
45 U.S.C. § 421 (1988)	7
45 U.S.C. § 431 (1988)	7
45 U.S.C. § 433(a) (1988)	7
45 U.S.C. § 433(b) (1988)	7, 8, 19
45 U.S.C. § 434 (1988)	<i>passim</i>
Rail Passenger Service Act, 45 U.S.C. §§ 501-658 (1988)	1
45 U.S.C. § 501a(6) (1988)	2
45 U.S.C. § 501a(8) (1988)	2
45 U.S.C. § 501(a) (1988)	2
45 U.S.C. § 541 (1988)	2
45 U.S.C. § 543(a)(1)(A) (1988)	2
45 U.S.C. § 548 (1988)	5
45 U.S.C. § 561 (1988)	2
45 U.S.C. § 562(e)(1) (1988)	2

	Page
45 U.S.C. § 562(f) (1988)	2
45 U.S.C. § 656 (1988)	2, 16
Regulations and Administrative Notices	
23 C.F.R. pt. 625 (1992)	20
23 C.F.R. § 646.214(b)(1) (1992)	10
23 C.F.R. § 646.214(b)(3)(i) (1992)	10
23 C.F.R. § 655.601 (1992)	10
23 C.F.R. § 655.603(a) (1992)	10
49 C.F.R. § 1.49(m) (1991)	8
49 C.F.R. § 213.9 (1991)	<i>passim</i>
49 C.F.R. § 213.9(c) (1991)	10, 17, 22
49 C.F.R. § 213.37 (1991)	20
49 C.F.R. § 213.57 (1991)	9
Notice of Proposed Rule Making, 36 Fed. Reg. 11,974 (1971)	9, 12, 21
Notice of Proposed Rule Making and Public Hearing, 37 Fed. Reg. 18,397 (1972)	9
Legislative History	
H.R. Rep. No. 1194, 91st Cong., 2d Sess. (1970), <i>reprinted in</i> 1970 U.S.C.C.A.N. 4104	15, 18
Statement of Rep. Springer, 116 Cong. Rec. 27,612 (1970)	18
Other Authorities	
American Ass'n of State Highway and Transp. Officials, <i>A Policy on Geometric Design of Highways and Streets</i> (1990)	20

	Page
Federal Highway Admin., U.S. Dep't of Transp., <i>Manual on Uniform Traffic Control Devices for Streets and Highways, adopted as law at 23 C.F.R. §§ 646.214(b)(1), 655.601 and .603(a) (1992)</i>	passim
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Federal Highway Admin., U.S. Dep't of Transp., <i>Railroad-Highway Grade Crossing Handbook (2d ed. 1986)</i>	3, 4
Federal R.R. Admin., U.S. Dep't of Transp., <i>Rail- Highway Crossing Accident/Incident and In- ventory Bulletin No. 13 (July 1991)</i>	5
Highway Research Bd., Nat'l Coop. Highway Re- search Program Rep. No. 50, <i>Factors Influenc- ing Safety at Highway-Rail Grade Crossings (1968)</i>	20
Interstate Commerce Comm'n, U.S. Dep't of Com- merce, Rep. No. 33440, <i>Prevention of Rail- Highway Grade-Crossing Accidents Involving Railway Trains and Motor Vehicles</i> , 322 I.C.C. 1 (1964)	3, 4
National R.R. Passenger Corp., <i>1991 Annual Report (1992)</i>	5

IN THE
Supreme Court of the United States

OCTOBER TERM, 1992

CSX TRANSPORTATION, INC.,
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**BRIEF AMICUS CURIAE OF
NATIONAL RAILROAD PASSENGER CORPORATION
IN SUPPORT OF PETITIONER/CROSS-RESPONDENT
CSX TRANSPORTATION, INC.**

INTEREST OF AMICUS CURIAE

The National Railroad Passenger Corporation ("Amtrak") is a government-funded corporation created by Congress in 1970 to assume responsibility for operating the country's intercity passenger trains.¹ Congress has directed Amtrak "to pro-

¹ In 1970 Congress enacted the Rail Passenger Service Act, Pub. L. No. 91-518, 84 Stat. 1327 (codified at 45 U.S.C. §§ 501-658 (1988)) ("RPSA"), authorizing the creation of Amtrak as a for-profit corporation responsible

vide intercity and commuter rail passenger service, employing innovative operating and marketing concepts so as to fully develop the potential of modern rail service in meeting the Nation's intercity and commuter passenger transportation requirements." 45 U.S.C. § 541 (1988).

Speed is critical to Amtrak's success. In order to meet its congressional mandate, Amtrak must be able to provide reliable high-speed service that will attract a significant ridership. 45 U.S.C. § 501(a). Congress has specifically instructed Amtrak to strive to achieve a system-wide average speed of at least 60 m.p.h., 45 U.S.C. § 501a(8), and to operate its trains to all station stops within fifteen minutes of the time established in public timetables for such operation. 45 U.S.C. § 501a(6). Recognizing the importance of speed in Amtrak's effort to attract passengers, Congress included several provisions in the RPSA encouraging Amtrak to travel at the highest possible speeds that are consistent with safe and efficient operations.²

for providing intercity rail passenger service throughout the United States. 45 U.S.C. § 541 (1988). Amtrak inherited routes, personnel, and equipment from the passenger services of many of the nation's freight railroads, including Petitioner CSX Transportation, Inc. ("CSXT"). 45 U.S.C. § 561. Although Amtrak is not an agency or establishment of the United States Government, 45 U.S.C. § 541, its annual operating deficits are federally funded, Department of Transportation and Related Agencies Appropriations Act, 1992, Pub. L. No. 102-143, 105 Stat. 917 (1991), and by statute the Secretary of Transportation sits as an ex officio member of Amtrak's Board of Directors. 45 U.S.C. § 543(a)(1)(A).

² Two provisions address Amtrak's rights to use track owned by freight railroads. Because freight trains operate at slower speeds than Amtrak's trains, Amtrak has priority over freight trains in the use of any given section of track. 45 U.S.C. § 562(e)(1). Where freight railroads refuse to permit Amtrak to operate at higher speeds over their track, Amtrak may petition the Secretary for an order permitting higher speeds. 45 U.S.C. § 562(f). A third provision concerns state or local speed restrictions that involve local safety hazards and that impede Amtrak's ability to provide high-speed rail passenger service. It directs Amtrak to identify these speed restrictions and to attempt to persuade state and local officials to deal with the local safety hazards through other means. 45 U.S.C. § 656.

Amtrak has frequently instituted legal action to eliminate state and local speed restrictions that impede its ability to provide high-speed rail passenger service and has consistently persuaded courts to declare them invalid, most often on the basis of federal preemption.³ Amtrak has challenged speed restrictions not merely in order to meet its statutory speed and service goals, but also because, for at least three reasons, slower speeds are not necessarily safer speeds.

(1) Unlike a car or truck, a train has a limited ability to reduce its speed in response to a safety hazard. Even at a speed of 30 m.p.h., by the time a passenger train engineer discerns an obstacle on the track ahead, it is generally too late to stop.⁴

(2) Slower speeds may actually increase the risk that motorists will cause grade crossing accidents. When

³ *National R.R. Passenger Corp. v. Town of Broussard*, Civ. No. 91-0012 (W.D. La. July 2, 1991); *National R.R. Passenger Corp. v. Township of Pennsauken*, Civ. No. 89-1552 (D.N.J. Oct. 30, 1989); *National R.R. Passenger Corp. v. City of Everett*, No. C89-834R (W.D. Wash. Oct. 4, 1989); *Consolidated Rail Corp. v. Smith*, 664 F. Supp. 1228 (N.D. Ind. 1987); *Southern Pac. Transp. Co. v. Town of Baldwin*, 685 F. Supp. 601 (W.D. La. 1987); *Southern Pac. Transp. Co. v. St. Charles Parish Police Jury*, 569 F. Supp. 1174 (E.D. La. 1983). Amtrak has also successfully challenged speed restrictions sought to be imposed under state common law. *Sisk v. National R.R. Passenger Corp.*, 647 F. Supp. 861 (D. Kan. 1986); *Lara v. National R.R. Passenger Corp.*, No. CIV. H. 85-697, 1986 WL 15725 (N.D. Ind. May 27, 1986).

⁴ See, e.g., Interstate Commerce Comm'n, U.S. Dep't of Commerce, Rep. No. 33440, *Prevention of Rail-Highway Grade-Crossing Accidents Involving Railway Trains and Motor Vehicles*, 322 I.C.C. 1, 77 (1964) ("ICC Rep.") (Due to its extreme weight [approximately 1,000 tons], "a passenger train consisting of eight cars and three diesel units traveling between 45 and 50 miles per hour would require approximately 2,000 feet within which to stop under emergency application of the train brakes."); Federal Highway Admin., U.S. Dep't of Transp., *Railroad-Highway Grade Crossing Handbook* 44 (2d ed. 1986) ("DOT Grade Crossing Handbook") (A typical 100-car freight train traveling 60 m.p.h. would require over one mile to stop in emergency braking.). In addition, sudden deceleration poses its own serious safety risks. See Federal Highway Admin., U.S. Dep't of

trains travel at higher speeds, drivers are more likely to obey the warning devices at grade crossings. When trains travel more slowly, drivers are more likely to ignore warning devices and attempt to drive through the crossing in front of the train in order to avoid a lengthy delay.⁵

(3) In some circumstances, particularly involving curved track, reducing train speeds to 25 m.p.h. or less may increase the chance of derailment.⁶

In large part because it has succeeded in increasing the speed of its trains, Amtrak is nearing achievement of its statu-

Transp., *Rail-Highway Crossings Study*, 5-10 (1989) ("DOT Crossings Study") ("A train in an emergency braking situation is subject to derailling, as well as to injury to passengers, and damage to lading, wheels, and brake systems.").

⁵ See, e.g., *DOT Grade Crossing Handbook* at 41:

[S]ome communities have passed ordinances restricting train speed for the purpose of improving safety. However, this practice directly reduces the level of service for highway traffic and may also affect safety. Because of the longer period of time during which the crossing is closed to highway traffic, a motorist may take risks by passing over the crossing just ahead of a train. In many cases, risks such as these are not successful and collisions result.

In addition, numerous studies have concluded that motorists, not railroads, are largely responsible for grade crossing accidents. See, e.g., *ICC Rep.* at 82 ("Now it is the highway, not the railroad, and the motor vehicle, not the train which creates the [grade crossing] hazard . . ."); *DOT Crossings Study* at 4-20 ("More than half of all rail-highway crossing accidents are the result of a motorist driving around lowered gates or proceeding through flashing red lights without stopping.").

⁶ *St. Charles Parish*, 569 F. Supp. at 1177 (Crediting expert testimony, court found that "due to harmonic roll and track/train dynamics, the effect of reducing train speed to 25 mph or less actually increases the likelihood of railroad car derailments."). This problem affects heavy freight trains most directly.

tory speed goal and has been able to enhance the appeal of its service to the traveling public.⁷ Amtrak presently provides intercity rail passenger service in 45 states and serves over 22,000,000 passengers per year.⁸

Amtrak submits this brief *amicus curiae* because it has a vital interest in the preemptive scope of federal railroad safety regulations, particularly those concerning train speed. State or local requirements that forced Amtrak to lower its operating speeds would cripple Amtrak's ability to meet Congress's specific speed goal and Congress's broader objective that Amtrak provide efficient rail passenger service at the lowest possible cost to the federal taxpayer. A requirement that Amtrak reduce its speed when approaching a grade crossing would be particularly disruptive. Amtrak trains travel through 14,485 grade crossings nationwide.⁹ Slowing down at these crossings would dramatically increase both travel times and operating expenses, and would do little or nothing to increase safety.¹⁰

⁷ Amtrak's system-wide average speed is approximately 55 m.p.h., and in 1991 its on-time percentage was 77 percent.

⁸ These statistics are set forth in annual reports Amtrak is directed to submit to the President and the Congress under 45 U.S.C. § 548. See National R.R. Passenger Corp., *1991 Annual Report* (1992). Amtrak also provides commuter rail passenger service in six states under contracts with local transportation authorities, serving over 18,000,000 passengers per year. *Id.*

⁹ See Federal R.R. Admin., U.S. Dep't of Transp., *Rail-Highway Crossing Accident/Incident and Inventory Bulletin No. 13* (July 1991).

¹⁰ Amtrak has estimated that reducing its operating speeds at grade crossings to 30 m.p.h. would lengthen a typical route's schedule by 36 percent and reduce Amtrak's average speed over that route to 37 m.p.h. Increases in operating expenses would ultimately be borne by the federal taxpayer. See *supra* note 1. As noted above, this serious degradation of rail passenger service would do little to enhance safety — in all likelihood a train traveling at 30 m.p.h. still would not be able to stop in time to avoid a collision with a vehicle that entered the grade crossing — and safety could well be diminished.

Amtrak also has a vital interest in the preemption of state laws concerning grade crossing safety. Amtrak has been in the vanguard of efforts to promote safety at grade crossings nationwide and has committed substantial resources to Operation Lifesaver, a national program to educate motorists and pedestrians about the hazards of grade crossings. As an operator of passenger service in 45 states, Amtrak has a strong interest in maintaining a uniform national approach to grade crossing safety, and in finding solutions that do not needlessly reduce maximum speeds for passenger trains.¹¹

This brief deals solely with the preemptive effect of federal regulations governing train speeds and supports affirmance of the Court of Appeals in No. 91-1206. Amtrak agrees with the views of CSXT and *amicus curiae* Association of American Railroads ("AAR") that Respondent Lizzie Beatrice Easterwood's grade crossing claim is also preempted, and thus Amtrak supports reversal of the Court of Appeals in No. 91-720.

¹¹ Even though Amtrak is not responsible for maintaining the vast majority of the grade crossings it uses, it bears the ultimate financial burden for any grade crossing accidents involving its trains. Amtrak owns most of the track over which it operates in the Northeast Corridor (Boston to Washington, D.C.) and has eliminated nearly all of the grade crossings on this line. Outside the Northeast Corridor, Amtrak operates over the lines of private freight railroads, including CSXT, pursuant to agreements entered into with these railroads when Amtrak commenced operations in 1971. Under these agreements, Amtrak is required to pay virtually all of the costs of grade crossing accidents involving its trains, though it has no control over the protective devices at these grade crossings.

STATUTORY AND REGULATORY BACKGROUND

Statutory Framework

In the late 1960s, Congress became alarmed at the increasing rate and severity of railroad accidents across the nation. In 1970, Congress passed the Federal Railroad Safety and Hazardous Materials Transportation Control Act, Pub. L. No. 91-458, 84 Stat. 971 (codified as amended at 45 U.S.C. §§ 421-445 (1988)) ("FRSA"), with the express purpose of substantially improving railroad safety: "[T]he purpose of [the Act] is to promote safety in all areas of railroad operations and to reduce railroad-related accidents, and to reduce deaths and injuries to persons and to reduce damage to property caused by accidents involving any carrier of hazardous materials." 45 U.S.C. § 421. Congress determined that improving railroad safety required a comprehensive national approach coordinated by the federal government. Congress thus directed the Secretary of Transportation to "(1) prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety . . . and (2) conduct, as necessary, research, development, testing, evaluation, and training for all areas of railroad safety." 45 U.S.C. § 431.

Congress believed that the grade crossing problem required particular attention. It directed the Secretary to study "the problem of eliminating and protecting railroad grade crossings," 45 U.S.C. § 433(a), and to "undertake a coordinated effort toward the objective of developing and implementing solutions to the grade crossing problem" 45 U.S.C. § 433(b). The Secretary was directed to exercise not only the authority provided by the FRSA, but also his authority over highway, traffic, and motor vehicle safety and highway construction. *Id.*

Congress also determined that the Secretary's regulations should have broad preemptive effect. Congress therefore in-

cluded in the FRSA an express statement of the Act's preemptive scope:

The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

45 U.S.C. § 434.

The Secretary's Railroad Safety Regulations

The Secretary has adopted rules that cover virtually every aspect of railroad operation, address many facets of highway and street safety, and fill nearly two volumes of the *Code of Federal Regulations*.¹² This case concerns only two issues covered by the Secretary's regulations — train speed and grade crossings. As noted above, Amtrak submits this brief solely on the issue of train speed.

The Secretary's train speed regulations establish maximum allowable operating speeds for six separate classes of track. Passenger trains are subject to one set of speeds (15 to

¹² The Secretary has delegated to the Federal Railroad Administrator his authority to carry out his functions under the FRSA, with the exception of his functions under the Act's grade crossing provision, 45 U.S.C. § 433(b), which concerns highway, traffic, and motor vehicle safety and highway construction. 49 C.F.R. § 1.49(m) (1991).

110 m.p.h.) and freight trains are subject to another (10 to 110 m.p.h.). 49 C.F.R. § 213.9 (1991).¹³ In general, passenger train speeds are significantly higher than those for freight trains; for example, on a straight section of Class 4 track, Amtrak is authorized to operate at 80 m.p.h., while freight trains are limited to 60 m.p.h. The Secretary has also established a formula for calculating maximum allowable speeds for both freight and passenger trains on curved track. 49 C.F.R. § 213.57.¹⁴

The Secretary considered a broad range of safety data when setting maximum allowable operating speeds.¹⁵ That he

¹³ The maximum allowable operating speeds in miles per hour are as follows:

Over track that meets all of the requirements prescribed in this part for—	The maximum allowable operating speed for freight trains is—	The maximum allowable operating speed for passenger trains is—
Class 1 track	10	15
Class 2 track	25	30
Class 3 track	40	60
Class 4 track	60	80
Class 5 track	80	90
Class 6 track	110	110

49 C.F.R. § 213.9.

¹⁴ The Secretary originally published speed limits that would apply to all trains, passenger and freight. Notice of Proposed Rule Making, 36 Fed. Reg. 11,974, 11,975 (1971). Amtrak petitioned the Secretary to establish higher speed limits for passenger trains operating over classes 1 through 5 track. The Secretary increased these speed limits, finding that "passenger trains can move faster than freight trains over classes 1 through 5 track with no loss in safety." Notice of Proposed Rule Making and Public Hearing, 37 Fed. Reg. 18,397, 18,397 (1972).

¹⁵ See 36 Fed. Reg. at 11,974. ("[The Secretary] considered information available within [the Department] and information as to 'existing safety data and standards' made available to it by representatives of the Association of American Railroads, railroad industry, railroad labor organizations, and State regulatory agencies.").

was concerned with numerous safety risks, including grade crossing accidents as well as derailments, is confirmed by subsection (c) of 49 C.F.R. § 213.9. That subsection provides that when the Secretary addresses a railroad's request for a maximum operating speed that exceeds 110 m.p.h., he will consider "performance characteristics of the track, signaling, grade crossing protection, trespasser control where appropriate," and other factors in determining whether "the proposed speed can be sustained in safety." 49 C.F.R. § 213.9(c). In setting maximum speeds, the Secretary was well aware of prior Department of Transportation and Interstate Commerce Commission studies suggesting that in many cases lower speeds could increase the likelihood of grade crossing accidents and possibly the risk of derailments as well. See *supra* note 5.

The Secretary also took into account those accepted principles of railroad safety and train dynamics in establishing comprehensive regulations covering grade crossing safety. Under the grade crossing regulations, train speed is an important consideration in determining what types of warning devices should be installed at a grade crossing. Federal Highway Admin., U.S. Dep't of Transp., *Manual on Uniform Traffic Control Devices for Streets and Highways* 8A-1, adopted as law at 23 C.F.R. §§ 646.214(b)(1), 655.601 and .603(a) (1992) ("MUTCD").¹⁶ Significantly, the Secretary did not adopt an approach whereby trains would be required to proceed more slowly at grade crossings; instead, because that approach was both impracticable and unlikely to promote safety, the Secretary chose to allow trains to travel through grade crossings

¹⁶ Speed is specifically addressed in the Secretary's grade crossing regulations. For example, the Secretary has concluded that train speed must be considered when determining whether to install automatic gates with flashing lights. 23 C.F.R. § 646.214(b)(3)(i). See also MUTCD at 8C-5 (speed considered in setting automatic flashing lights); MUTCD at 8B-5 (speed considered in determining appropriate illumination).

at speeds deemed safe in light of track characteristics and configuration, and opted to minimize grade crossing accidents by prescribing the use of various devices to warn motorists.¹⁷ Speed, in other words, was treated as the baseline parameter to which decisions on other precautions would be accommodated.

The Secretary's determination to take train speed as a baseline is confirmed by the way his regulations address the hazard created when different trains traverse a grade crossing at significantly different speeds. Signals warning motorists of approaching trains must be timed according to train speed, and proper timing is critical: too short a warning has obvious dangers, while too long a warning may encourage motorists to drive around gates or through signals.¹⁸ One way to have signals timed correctly for all trains would be to require all trains to travel at the lowest common denominator of authorized speed. The Secretary adopted quite a different approach: the regulations allow trains to operate through a grade crossing at significantly different speeds, and call for the installation of more sophisticated sensing devices so that faster trains will be detected and warnings will be given to motorists at the appropriate time.¹⁹

In adopting regulations on maximum allowable train speeds, including maximum speeds through grade crossings, the Secretary made judgments that expressly involved cost-

¹⁷ 49 C.F.R. § 213.9; see also *supra* note 16.

¹⁸ See DOT Crossings Study at 4-6 ("Care must also be taken to ensure that the warning time is not excessive. If the roadway user cannot see the train approaching, he may attempt to cross the tracks despite the operation of the flashing light signals — and even lowered gates, if present."). See also *supra* note 5.

¹⁹ See MUTCD at 8C-5 ("Where the speeds of different trains on a given track vary considerably under normal operation, special devices or circuits should be installed to provide reasonably uniform notice in advance of all train movements over the crossing.").

benefit calculations. The Secretary recognized specifically that his speed limit regulations have both costs and benefits:

[E]very safety regulation has a cost factor, either a direct purchase and operation cost or an indirect cost resulting from operating at less than maximum efficiency. Every safety regulation also has a benefit factor — the increase in safety to the public and railroad personnel and a benefit to the railroads in reducing its casualty losses and damage claims. Although the cost of complying with a regulation may be initially borne by the railroad, it is ultimately paid by the public. Thus, the cost/benefit determination to be made by the FRA with respect to a particular safety requirement is whether the safety benefit to the public and railroad personnel justifies the ultimate monetary cost of compliance to the public.

36 Fed. Reg. at 11,974. Recognizing that the public has an interest in both safety and efficiency, and that train speed is an important component of efficiency, the Secretary adopted speed limits that would permit the fastest rate of travel consistent with safe operation. He presumably also recognized that in setting speeds at the maximum safe level, he was promoting Congress's statutory goal of allowing intercity passenger trains to provide enhanced service to the traveling public.

SUMMARY OF ARGUMENT

This case considers whether federal law preempts Mrs. Easterwood's claim that the CSXT train, though moving well below the federal maximum track speed, was nevertheless violating state common law by traveling at an excessive speed through the Cook Street grade crossing. Amtrak respectfully submits that her claim is preempted by the FRSA and rules promulgated by the Secretary of Transportation relating to railroad safety. Congress has expressly declared in the FRSA that railroad safety rules should be nationally uniform and that safety rules promulgated by the Secretary of Transportation

shall preempt any state rules covering the same subject matter. The Secretary has established comprehensive rules for train speeds, including speeds through grade crossings, and under the plain language of 45 U.S.C. § 434 those rules preempt Mrs. Easterwood's state common law claim.

ARGUMENT

I. FEDERAL LAW PREEMPTS MRS. EASTERWOOD'S SPEED CLAIM

The Court's preemption principles are well settled. Whether a federal enactment preempts state law turns on congressional intent, the "ultimate touchstone" of preemption analysis. *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478, 482 (1990) (quoting *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985)). To determine congressional intent, the Court must "begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Morales v. TWA*, 112 S. Ct. 2031, 2036 (1992) (quoting *FMC Corp. v. Holliday*, 111 S. Ct. 403, 407 (1990)).²⁰

²⁰ Congress can indicate its intent to preempt state law in two ways: (1) expressly, by so stating on the face of the statute, or (2) impliedly, by enacting rules or regulations that comprehensively govern an entire field, such that there is no room for additional regulation by the states. *Hillsborough County v. Automated Medical Labs., Inc.*, 471 U.S. 707, 713 (1985) (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Even if Congress fails to express its intent to displace state law, state law is preempted to the extent it actually conflicts with federal law. This conflict often arises when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). The Court in *Cipollone* noted that when Congress has included in the statute a provision explicitly addressing preemption, as Congress did in § 434, there is no need to look beyond that provision to determine the statute's preemptive scope. *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2618 (1992).

Here Congress's intent is clear. The FRSA expressly states that the Secretary of Transportation should promulgate comprehensive rules covering railroad safety and that all rules "relating to railroad safety" should, if practicable, be nationally uniform. 45 U.S.C. § 434.²¹ The FRSA also expressly provides that once the Secretary adopts a rule covering a particular subject matter, all state rules covering that subject matter are preempted. The FRSA provides an exception to its general declaration of preemption, but a narrow one: a state rule may survive only if it addresses "an essentially local safety hazard," is not incompatible with federal law, and does not unduly burden interstate commerce. 45 U.S.C. § 434.

There can be no doubt that the FRSA preempts state common law — such as the common law duty Mrs. Easterwood seeks to enforce in this action — as well as state statutory law. Section 434 preempts any state "law, rule, regulation, order, or standard relating to railroad safety." The Court has consistently held that the phrase "state law," when given its ordinary meaning, includes common law as well as statutes and regulations. *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2620 (1992) (The phrase "requirement or prohibition . . . imposed under State law" includes "obligations that take the form of common law rules."); *Norfolk & W. Ry. Co. v. American Train Dispatchers Ass'n*, 111 S. Ct. 1156, 1163 (1991) (The phrase "all other law, including State and municipal law" encompasses state common law.); *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972) (The term "laws," when given its "natural meaning," includes "claims founded upon . . . common law as well as those of statutory origin.").

In this case the plain meaning of the FRSA's preemption language — "law, rule, regulation, order, or standard" —

²¹ The Court last term interpreted a similar preemption provision and held that the ordinary meaning of "relating to" is a broad one and that "the words thus express a broad pre-emptive purpose." *Morales*, 112 S. Ct. at 2037.

encompasses state common law. The legislative history of the FRSA strongly suggests that Congress intended to preempt common law claims as well as those based on legislation or regulation.²² Congress recognized, as this Court has often stated, that the effect of allowing state common law claims to survive would be to regulate train speeds through jury verdicts and damage awards. Most recently in *Cipollone*, the Court reaffirmed the commonsense point that damage actions can have the same effect as affirmative regulation: "The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *Cipollone*, 112 S. Ct. at 2620 (quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)). See also *International Paper Co. v. Ouellette*, 479 U.S. 481, 495 (1987).

A. The Secretary of Transportation Has Promulgated Regulations That Cover the Subject Matter of Train Speeds Through Grade Crossings

In accordance with Congress's directive in the FRSA, the Secretary has adopted comprehensive railroad safety rules. In particular, he has adopted rules covering train speed. These rules set "maximum allowable operating speeds" for railroad travel over nearly all of the nation's track, including the track at issue in this case and all of the track Amtrak uses. 49 C.F.R. § 213.9. Once the Secretary adopts regulations on the subject

²² See H.R. Rep. No. 1194, 91st Cong., 2d Sess. (1970), reprinted in 1970 U.S.C.C.A.N. 4104, 4110-11 ("To subject a carrier to enforcement before a number of different State administrative and judicial systems in several areas of operation could well result in an undue burden on interstate commerce."). See also *id.* at 4109 ("[S]ubjecting the national rail system to . . . 50 different judicial and administrative systems" would adversely affect rail safety.). The language of the House Report is strikingly similar to that used by this Court in *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 326 (1981): "A system under which each State could, through its courts, impose on railroad carriers its own version of reasonable service requirements could hardly be more at odds with the uniformity contemplated by Congress"

of speed — as he now has — no state may continue in force any speed rule unless it can fit that rule within section 434's savings clause for local safety hazards.²³

Mrs. Easterwood claims that state law imposes a duty on CSXT to reduce its speed below the federally authorized speed limit when traveling through a crossing that has the characteristics of the Cook Street crossing. Her claim involves a state law concerning a subject matter covered by the Secretary's regulations — train speed — and thus is preempted unless it fits within section 434's savings provision.

Mrs. Easterwood attempts to escape the preemptive effect of the Secretary's speed regulations by arguing that the Secretary set train speed limits only to prevent derailments, not to prevent grade crossing accidents. Her point has no grounding in law or in fact. As the Eleventh Circuit noted, this Court has made clear that preemption analysis is not concerned with whether the federal law's purposes are similar to the state law's purposes. *Easterwood v. CSX Transp., Inc.*, 933 F.2d 1548, 1554 (11th Cir. 1991), *cert. granted*, 112 S. Ct. 3024 (1992) (citing *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963)). *See also Napier v. Atlantic Coast Line R.R. Co.*, 272 U.S. 605, 612-13 (1926) (State law is preempted whenever "federal and state statutes are directed to the same subject . . . [,] however commendable or however different their purpose."). Preemption analysis turns on Congress's intent to preempt and the nature of the federal regulations at issue. *Easterwood*, 933 F.2d at 1554.

²³ In 1980, Congress directed Amtrak to identify and attempt to eliminate state and local speed restrictions. 45 U.S.C. § 656. Congress stated that when Amtrak consulted with local officials regarding alternatives to a speed restriction, it should take into account "the particular local safety hazard which is the basis for such restriction" 45 U.S.C. § 656 (emphasis added). This language plainly was drafted to parallel the terms of the savings provision: once the Secretary adopted speed regulations, as he had well before 1980, state and local speed restrictions could survive under § 434 only if they were directed to "local safety hazards."

Moreover, the Secretary in fact took into account many considerations — including grade crossing safety — in promulgating his speed regulations. As explained in greater detail above, there is substantial interplay between the Secretary's speed and grade crossing regulations. Significantly, speed is the constant factor, with grade crossing protections tailored to speeds, instead of speeds reduced to minimize dangers at grade crossings. *See supra* pp. 10-11. The Secretary has expressly stated that in setting higher train speeds, he must be satisfied "that the proposed speed can be sustained in safety" and that his safety concerns are not limited to derailment risk but include grade crossing protection and trespasser control. 49 C.F.R. § 213.9(c). Accordingly, because the Secretary has spoken on the issue of train speeds through grade crossings, Mrs. Easterwood can prevail only if she can fit her claim within section 434's savings provision.

B. The State Common Law Rule Mrs. Easterwood Seeks to Enforce Does Not Fit Within the Savings Provision of Section 434

In order to fall within the savings provision, a state law must meet each of three separate requirements: (1) it must be "necessary to eliminate or reduce an essentially local safety hazard"; (2) it must not be incompatible with any federal law or regulation; and (3) it must not create an undue burden on interstate commerce. On this record, it is plain that the rule of law Mrs. Easterwood seeks to enforce fails to meet at least the first two requirements, and probably does not satisfy the third.²⁴

²⁴ The undue burden issue was not developed in the district court, and the caselaw does not offer any guidance as to the meaning of "undue burden" in § 434. Courts examining challenges to local speed ordinances brought under the United States Constitution's Commerce Clause, U.S. Const. art. I, § 8, cl. 3, rather than § 434 have consistently held that these ordinances unduly burden interstate commerce. *See Johnson v. Southern Ry. Co.*, 654

1. The Rule Mrs. Easterwood Seeks to Enforce Does Not Address a "Local Safety Hazard" Within the Meaning of Section 434

The state common law rule Mrs. Easterwood invokes does not address "an essentially local safety hazard." As the House Report makes clear, Congress intended "local safety hazard" to be narrowly construed:

The purpose of this . . . provision is to enable the States to respond to local situations *not capable of being adequately encompassed within uniform national standards*. The States will retain authority to regulate individual local problems where necessary to eliminate or reduce essentially local railroad safety hazards. Since these local hazards would not be Statewide in character, there is *no intent to permit a State to establish Statewide standards superimposed on national standards covering the same subject matter*.

H.R. Rep. No. 1194, 1970 U.S.C.C.A.N. at 4117 (emphasis added).²⁵

The rule of law Mrs. Easterwood seeks to enforce here — a general duty of reasonable care — is not focused on a particular, identifiable local safety hazard. Rather, it is a broad rule of statewide applicability — precisely the sort of "Statewide

F. Supp. 121, 123 (W.D.N.C. 1987); *Southern Pac. Transp. Co. v. St. Charles Parish Police Jury*, 569 F. Supp. 1174, 1179 (E.D. La. 1983).

Because it is apparent that restrictions at the grade crossings Amtrak traverses would substantially hinder its ability to provide fast, reliable passenger service, and because the evidence indicates that slow train speeds do not lead to greater safety (and in many cases diminish safety), *see supra* pp. 3-4, the rule of law Mrs. Easterwood asserts would appear to constitute an undue burden under both § 434 and the Commerce Clause.

²⁵ Additional legislative history supports a narrow interpretation of "local safety hazard." *See* 116 Cong. Rec. 27,612 (1970) (statement of Rep. Springer that the savings clause was intended to allow a state to "take charge of purely local hazards").

standard[] superimposed on national standards covering the same subject matter" that Congress intended to forbid. The Eleventh Circuit clearly was correct when it held that the "savings clause is irrelevant to the case at hand because a state does not legislate a general duty of care in order to eliminate a local safety hazard." *Easterwood*, 933 F.2d at 1553 n.3.

Moreover, Mrs. Easterwood's common law claim addresses a hazard — speeds through grade crossings — that is "capable of being adequately encompassed within uniform national standards." Congress so determined when it declared that grade crossing safety should be dealt with on a national level and specifically directed the Secretary to "undertake a coordinated effort toward the objective of developing and implementing solutions to the grade crossing problem . . ." 45 U.S.C. § 433(b).

In addition, all of the individual elements underlying Mrs. Easterwood's speed claim are capable of being adequately encompassed within uniform national standards, and most in fact are covered by existing standards.²⁶ Most of the elements — the curve in the tracks, the vegetation, and the hump — chiefly concern a motorist's ability to see an approaching train. Under the Secretary's regulations the motorist's line of sight at a crossing is an express and significant consideration in determining what grade crossing protection is appropriate for safe operation in light of specified train speeds.²⁷ Sight distance

²⁶ According to Mrs. Easterwood's certiorari petition, trains have a common law duty to slow down at the Cook Street crossing due to "the numerous hazards at [the] crossing and the large number of motorists who traverse the crossing . . ." The hazards include "a curve in the tracks just north of Cook Street which allows only 150 feet of sight distance for a motorist looking up the track . . . [.] the amount of vegetation allowed to grow along the side of the track, frequently malfunctioning signals which produce false warnings, and a hump in the crossing which make the tracks difficult for drivers of large trucks to maneuver." *Easterwood Cert. Pet.* at 4.

²⁷ *See, e.g., MUTCD* at 8B-9 (Whether to use stop signs at grade crossings depends, in part, on motorists' line of sight to an approaching train

analysis takes into account not only curves in the track but also vegetation that hinders visibility and the level of the track relative to that of the road.²⁸ Accordingly, it is clear that even the individual elements of Mrs. Easterwood's speed claim are capable of being dealt with through uniform national standards, and thus her claim does not fit within the narrow definition of "local safety hazard" Congress intended for the savings provision.²⁹

2. The Rule Mrs. Easterwood Seeks to Enforce Would Be Incompatible with the Secretary's Speed Regulations

Mrs. Easterwood's speed claim also fails to meet the savings provision's second requirement: the rule of law she posits is incompatible with the Secretary's speed regulations. Mrs. Easterwood's claim is that CSXT violated its state common law duty to slow down to a speed that is "reasonable and

and sight distance down the track while at the stop bar.); *MUTCD* at 8B-5 (Whether to illuminate grade crossing depends, in part, on motorists' ability to see trains during hours of darkness.). See also Highway Research Bd., Nat'l Coop. Highway Research Program Rep. No. 50, *Factors Influencing Safety at Highway-Rail Grade Crossings* 25 (1968) (importance of sight distance in the design and improvement of grade crossings); *DOT Crossings Study* at 5-9, 5-10 (same).

²⁸ See, e.g., *MUTCD* at 8B-5 (Illumination at a crossing may be required "where the gradient of the vehicular approaches is such that the headlights of an oncoming vehicle shine under or over the [train] cars."). Vegetation at or near the tracks has also been addressed separately by the Secretary in regulations concerning track maintenance. 49 C.F.R. § 213.37 (track owners must contain vegetation so that it does not pose a fire hazard, obstruct visibility, or create other safety hazards). With regard to Mrs. Easterwood's claim concerning the hump in the crossing, standards concerning vertical alignment of the railroad tracks in relation to the roadway are set forth in American Ass'n of State Highway and Transp. Officials, *A Policy on Geometric Design of Highways and Streets* 842-51 (1990) ("AASHTO Policy"). In establishing standards to govern federal aid highway projects, the Secretary has adopted the AASHTO Policy as law. 23 C.F.R. pt. 625.

²⁹ With respect to the final "hazard" of Mrs. Easterwood's speed claim — frequently malfunctioning signals — the legal analysis is clear. As both

prudent under the circumstances." The circumstances for which CSXT allegedly failed to slow down involve no extraordinary conditions that existed on the morning of February 24, 1988; they are present every day at the Cook Street crossing and, most likely, at hundreds of other crossings in Georgia and throughout the United States.³⁰ Therefore, the thrust of her state law claim is to force trains routinely to pass through the Cook Street crossing at a speed that is lower than the speed limit set by the Secretary.

That rule of law plainly is incompatible with the Secretary's regulations. In setting maximum operating speeds the Secretary expressly engaged in cost-benefit analysis. 36 Fed. Reg. at 11,974. One of his goals was to authorize the highest possible speeds consistent with Congress's safety goals. He thus set speeds as high as he deemed safe in order to authorize

CSXT and AAR note in their briefs, the savings provision leaves room for state common law claims alleging violations of federal safety standards, including those the Secretary has issued concerning signals. However, Mrs. Easterwood's approach — a legal rule that would effectively require trains to operate at slower speeds — is incompatible with the Secretary's approach to speeds at grade crossings; moreover, it is unduly burdensome, effectively requiring all carriers using a line to become familiar with the status of the home railroad's maintenance efforts.

³⁰ A few cases have addressed claims brought under state law that a railroad failed to reduce its speed when faced with a sudden and extraordinary dangerous condition or event. *Central of Ga. R.R. Co. v. Markert*, 410 S.E.2d 437, 439 (Ga. App. 1991) (claim that railroad employees failed to take precautions after it was apparent that vehicle was about to cross the track not preempted), *cert. denied*, 200 Ga. App. 895 (1991); *Florida E. Coast Ry. v. Griffin*, 566 So. 2d 1321, 1324 (Fla. Dist. Ct. App. 1990) (claim that railroad employees failed to issue a stop order when it became apparent that children were about to cross the track not preempted). These cases stand for the proposition that federal law will not absolve a railroad of its duty to act with reasonable care when faced with an extraordinary circumstance or event such as persons, animals, vehicles, or other obstacles suddenly appearing in plain view on the roadbed. Because Mrs. Easterwood has not raised such a claim, the Court need not reach this issue.

trains to operate at those speeds. The Secretary was explicit that he was establishing speeds that could be safely *sustained*, not maximum speeds that were to be reduced routinely based on recurring operational considerations. *See, e.g.*, 49 C.F.R. § 213.9(c). Setting a lower maximum speed is inconsistent with the purposes of the Secretary's rules.

Incompatibility is all the more apparent in light of the Secretary's decision to authorize prescribed speeds *through grade crossings*. As Amtrak noted above in response to Mrs. Easterwood's arguments that the Secretary's speed regulations deal only with the risk of derailment, the Secretary in fact squarely faced the problem of grade crossings and opted to build other precautions around prescribed speed limits rather than to vary speed based on the hazardous characteristics of each crossing.³¹ He has adopted speed limits that can be sustained in crossings, with the safety of those crossings assured through careful review of potential hazards, such as limited visibility, and the subsequent installation of appropriate warning devices. A common law rule prescribing lower speeds in crossings would conflict directly with the Secretary's chosen approach.³²

³¹ As noted above, one of the precautions that is built around prescribed speed limits is properly timed warning signals. This element of the Secretary's regulations highlights a risk of imposing a common law duty on railroads to slow down based on varying perceptions of hazards at specific grade crossings: as trains slow down to promote safety, they may be traveling at speeds that render the timing of signal circuits inappropriate and even dangerous. *See supra* p. 11.

³² Because of this fundamental incompatibility, even in the absence of § 434, Mrs. Easterwood's common law rule would be preempted on the theory of conflict preemption. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525-26 (1977).

CONCLUSION

This case presents a clear instance of express federal preemption. The Secretary's regulations deal squarely with the issue of train speeds through grade crossings, and thus there is no room for Mrs. Easterwood's claim under section 434. Accordingly, Amtrak supports affirmance of the Court of Appeals in No. 91-1206, as well as reversal in No. 91-790.

Respectfully submitted,

Stephen C. Rogers
Charles E. Mandolia
National Railroad Passenger
Corporation
60 Massachusetts Avenue, N.E.
Washington, D.C. 20002
(202) 906-3995

Paul F. Mickey, Jr.*
Alvin Dunn
Shaw, Pittman, Potts &
Trowbridge
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000

Counsel for Amicus

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*Counsel of Record

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IN THE
Supreme Court of the United States OF THE CLERK
OCTOBER TERM, 1992

CSX TRANSPORTATION, INC.,
v. *Petitioner*

LIZZIE BEATRICE EASTERWOOD
Respondent

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v. *Petitioner*

CSX TRANSPORTATION, INC.
Respondent

**On Writs of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit**

**BRIEF FOR THE TEXAS CLASS I RAILROADS AS
AMICI CURIAE IN SUPPORT OF PETITIONER IN
NO. 91-790 AND RESPONDENT IN NO. 91-1206**

(Amici Curiae listed on inside cover)

CAROLYN F. CORWIN
CECILY E. MCCOWEN
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

ROBERT BRIAN BURNS, JR.
WILSON, GROSENHEIDER & BURNS
P.O. Box 1584
Austin, Texas 78767
(512) 478-1657

PAUL A. CUNNINGHAM
GERALD P. NORTON *
PEPPER, HAMILTON & SCHEETZ
1300 - 19th Street, N.W.
7th Floor
Washington, D.C. 20036
(202) 828-1200

*Counsel for Amici Curiae
Texas Class I Railroads*

August 27, 1992

* Counsel of Record

LIST OF AMICI CURIAE

Missouri Pacific Railroad Company
Southern Pacific Transportation Company
St. Louis Southwestern Railway Company
Atchison, Topeka & Santa Fe Railway Company
Burlington Northern Railroad Company
Kansas City Southern Railway Company
Louisiana & Arkansas Railway Company

TABLE OF CONTENTS

	Page
INTEREST OF THE AMICI CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. A BROAD VIEW OF THE SUBJECT MATTER PREEMPTED BY SECTION 434 IS ESSEN- TIAL TO ACHIEVE THE NATIONAL UNI- FORMITY CONGRESS INTENDED	5
II. CONGRESS HAS PREEMPTED BROADLY IN THE RAILROAD SAFETY FIELD	9
A. The Statutory Language Broadly Mandates National Uniformity in the Field of Railroad Safety	10
B. The History of the FRSA Confirms That Congress Wanted National Uniformity in Railroad Safety Standards	13
III. TO MEET CONGRESS'S MANDATE FOR NATIONAL UNIFORMITY, THE TRANSI- TIONAL "COVERING THE SUBJECT MAT- TER" EXCEPTION MUST BE CONSTRUED NARROWLY	17
A. The "Covering the Subject Matter" Excep- tion Is a Transitional Measure that Lacks Continuing Force	18
B. Assuming the "Covering the Subject Matter" Exception Continues to Have Some Force, It Should Be Interpreted to Preserve Broad Preemption	19
1. Reading the Exception to Preserve Broad Preemption Best Serves the Purpose and Language of the Statute	19
2. The Existence of Different Regulatory Ob- jectives Should Not Bar a Finding of Preemption	20

TABLE OF CONTENTS—Continued

	Page
3. Regulation in the Same Manner or to the Same Extent Should Not Be Required for a Finding of Preemption	23
4. Determining That the Secretary Has "Covered" a "Subject Matter" Should Not Require a Complicated Showing	25
CONCLUSION	27

TABLE OF AUTHORITIES

CASES	Page
<i>A. H. Phillips, Inc. v. Walling</i> , 324 U.S. 490 (1945)	12
<i>Black v. Baltimore & Ohio R.R.</i> , 398 N.E.2d 1361 (Ind. App. 1980)	6, 26
<i>Black v. Seaboard System R.R.</i> , 487 N.E.2d 468 (Ind. App. 1986)	6, 26
<i>Burlington Northern R.R. v. State of Minnesota</i> , 882 F.2d 1349 (8th Cir. 1989)	7
<i>Burlington Northern R.R. v. State of Montana</i> , 880 F.2d 1104 (9th Cir. 1989)	7, 22
<i>Cipollone v. Liggett Group, Inc.</i> , 112 S. Ct. 2608 (1992)	9, 10
<i>Commissioner v. Clark</i> , 489 U.S. 726 (1989)	12
<i>Donelon v. New Orleans Terminal Co.</i> , 474 F.2d 1108 (5th Cir.), <i>cert. denied</i> , 414 U.S. 855 (1973)	12
<i>Florida Lime & Avocado Growers, Inc. v. Paul</i> , 373 U.S. 132 (1963)	21
<i>Gade v. National Solid Wastes Management Association</i> , 112 S. Ct. 2374 (1992)	21
<i>Hatfield v. Burlington Northern R.R. Co.</i> , 958 F.2d 320 (10th Cir. 1992), <i>pet. for cert. pending</i> , No. 91-1977	8
<i>Illinois Central Gulf R.R. v. Tennessee Public Service Commission</i> , 736 S.W.2d 112 (Tenn. App. 1987)	6
<i>McNary v. Haitian Refugee Center, Inc.</i> , 111 S. Ct. 888 (1991)	21
<i>Missouri Pacific R.R. Co. v. Lemon</i> , No. A-14-91-652-CV (Tex. App. 14th Dist.)	2
<i>Missouri Pacific R.R. Co. v. Railroad Commission of Texas</i> , 653 F. Supp. 617 (W.D. Tex.), <i>aff'd in part and rev'd in part</i> , 833 F.2d 570 (5th Cir. 1987), <i>on remand</i> , No. A-86-CA-406 (W.D. Tex. 1990), <i>aff'd</i> , 948 F.2d 179 (5th Cir. 1991), <i>pet. for cert. pending</i> , No. 91-1423	2, 6, 8, 18, 18, 21, 22, 23, 25

TABLE OF AUTHORITIES—Continued

	Page
<i>Missouri Pacific R.R. Co. v. Railroad Commission of Texas</i> , 850 F.2d 264 (5th Cir. 1988), cert. denied, 488 U.S. 1009 (1989)	7, 11, 19
<i>Morales v. Trans World Airlines, Inc.</i> , 112 S. Ct. 2031 (1992)	11
<i>Napier v. Atlantic Coast Line R.R. Co.</i> , 272 U.S. 605 (1926)	21
<i>Norfolk & Western Railway Co. v. American Train Dispatchers Association</i> , 111 S. Ct. 1156 (1991) ..	10
<i>Norfolk & Western Railway Co. v. Burns</i> , 587 F. Supp. 161 (E.D. Mich. 1984)	6
<i>Norfolk & Western Railway Co. v. Public Utilities Commission of Ohio</i> , 926 F.2d 567 (6th Cir. 1991)	6, 26
<i>Palmer v. Thompson</i> , 403 U.S. 217 (1971)	22
<i>Perez v. Campbell</i> , 402 U.S. 637 (1971)	21, 23
<i>Pilot Life Insurance Co. v. Dedeaux</i> , 481 U.S. 41 (1987)	10, 11
<i>Pinter v. Dahl</i> , 486 U.S. 622 (1988)	12
<i>Rayner v. Smirl</i> , 873 F.2d 60 (4th Cir.), cert. denied, 493 U.S. 876 (1989)	8
<i>Southern Pacific Co. v. Arizona</i> , 325 U.S. 761 (1945)	7
<i>Southern Pacific Transportation Co. v. Public Utilities Commission of California</i> , 647 F. Supp. 1220 (N.D. Cal. 1986), aff'd, 820 F.2d 1111 (9th Cir. 1987) (per curiam)	2, 6, 9, 18, 21
<i>Spokane & Inland Empire R.R. Co. v. United States</i> , 241 U.S. 344 (1916)	12
<i>Tcherepnin v. Knight</i> , 389 U.S. 332 (1967)	12
<i>Union Pacific R.R. Co. v. Public Utilities Commission of California</i> , No. 82-5952 (9th Cir. June 27, 1983)	6
<i>United States v. O'Brien</i> , 391 U.S. 367 (1968)	22
<i>United States Department of Energy v. Ohio</i> , 112 S. Ct. 1627 (1992)	21
<i>Wisconsin Department of Revenue v. William Wrigley, Jr., Co.</i> , 112 S. Ct. 2447 (1992)	21

TABLE OF AUTHORITIES—Continued

STATUTES AND REGULATIONS	Page
Federal Railroad Safety Act of 1970, 45 U.S.C. §§ 431 et seq.	2
45 U.S.C. § 431	10, 15
45 U.S.C. § 432	10
45 U.S.C. § 433	14
45 U.S.C. § 434	passim
45 U.S.C. §§ 435-39	10
Or. Rev. Stat. § 761.200 (1991)	6
23 C.F.R. Chs. I, II	18
Pt. 646	24
Pt. 655	24
Pt. 924	24
Pt. 1204	24
49 C.F.R. Ch. II	18
Pt. 209	19
Pt. 213	19, 25
§ 213.31	25
Pt. 215	19
Pt. 217-21	19
Pt. 223	19
Pt. 225	19
Pt. 233	19
Pt. 236	19
Pt. 240	19
Ariz. Corp. Comm'n Admin. Reg. R14-5-405	6
Mo. Code Regs. tit. 4, § 265-8.110	6
Nev. Admin. Code ch. 705, § 150 (1987)	6
Or. Admin. R. 860-44-210 et seq. (1991)	6
MISCELLANEOUS	
116 Cong. Rec. (1970) :	
p. 27611	13
p. 27612	16
p. 27613	8, 15
pp. 27615-16	13
<i>Federal Railroad Safety Act of 1969: Hearings on S.1933, S.2915, and S.3061 Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce</i> , 91st Cong., 1st Sess. (1969)	17

TABLE OF AUTHORITIES—Continued

	Page
H.R. Rep. No. 91-1194, 91st Cong., 2d Sess. (1970)	13, 14, 15, 16, 17
<i>Railroad Safety and Hazardous Materials Control: Hearings on H.R. 7068, H.R. 14417, H.R. 14478, and S. 1933 Before the Subcomm. on Transpor- tation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 91st Cong., 2d Sess. (1970)</i>	15, 16, 17
S. Rep. No. 91-619, 91st Cong., 1st Sess. (1969)	13, 14, 17, 20
Weaver & Rago, "Politics and Poker:" <i>The Texas Railroad Commission</i> , 17 ABA Admin. L. News 7 (Summer 1992)	9

IN THE
Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-790

CSX TRANSPORTATION, INC.,
v. *Petitioner*

LIZZIE BEATRICE EASTERWOOD
Respondent

No. 91-1206

LIZZIE BEATRICE EASTERWOOD,
v. *Petitioner*

CSX TRANSPORTATION, INC.
Respondent

**On Writs of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit**

**BRIEF FOR THE TEXAS CLASS I RAILROADS AS
AMICI CURIAE IN SUPPORT OF PETITIONER IN
NO. 91-790 AND RESPONDENT IN NO. 91-1206**

INTEREST OF THE AMICI CURIAE ¹

The *amici*, members of the Texas Railroad Association, are Class I railroads that operate freight trains throughout a number of states, including the State of Texas.

¹ Pursuant to Rule 37.3 of the Rules of this Court, letters indicating the written consent of all parties to the filing of this brief are being lodged with the Court.

Each is a respondent in a case currently pending before this Court, *Railroad Comm'n of Texas v. Missouri Pacific R.R.*, No. 91-1423 (pet. for cert. filed Mar. 5, 1992). In that case the Texas Railroad Commission seeks review of a decision of the United States Court of Appeals for the Fifth Circuit holding that state requirements for walkways adjoining railroad tracks and roadbeds are preempted under the Federal Railroad Safety Act of 1970, 45 U.S.C. §§ 431 *et seq.* ("FRSA"). The Fifth Circuit's decision is in conflict with the decision of another court of appeals regarding state regulation of walkways, *Southern Pacific Transportation Co. v. Public Utilities Comm'n of California*, 820 F.2d 1111 (9th Cir. 1987).

The preemption provision at issue in the walkways case, 45 U.S.C. § 434, is the same provision under consideration in this case. In addition, *amici* have made preemption arguments based on Section 434 in response to state and local efforts to regulate safety aspects of other railroad operations, involving, for example, transportation of hazardous materials, use of cabooses, and accident reporting. All *amici* also have an interest in the specific issues presented by this case, involving federal preemption of state common law standards relating to the need for traffic control devices at crossings and train speed. As parties to litigation concerning grade crossing incidents, *amici* have raised federal preemption defenses similar to those raised by CSX Transportation here. For example, one *amicus*, the Missouri Pacific Railroad Company, is currently challenging a \$12 million jury verdict against it in part on the ground that the plaintiffs' claims of failure to install active traffic control devices at a grade crossing and excessive train speed are preempted. *Missouri Pacific R.R. Co. v. Lemon*, No. A-14-91-652-CV (Tex. App. 14th Dist.).

For all these reasons, *amici* have an interest in the analysis the Court adopts in this case. *Amici* believe it is important that, in deciding this case, the Court recog-

nize the broad mandate for national uniformity that Congress articulated in the FRSA and apply Section 434 in a manner that will give effect to that mandate. In particular, *amici* focus their attention on the transitional exception in Section 434 permitting state regulation unless the Secretary of Transportation has adopted regulations "covering the subject matter" of the state requirement, an exception involved in both this case and No. 91-1423. *Amici* submit that the Court should construe the "covering the subject matter" exception so that state law is preempted when it concerns the same basic subject as the federal regulation. Application of the exception should be straightforward. There should be no requirement that the Secretary and the state agency have the same purpose or regulate in precisely the same manner or that there be a showing of functional conflict between the two regulations.

SUMMARY OF ARGUMENT

In the Federal Railroad Safety Act Congress provided for establishment of uniform, comprehensive rules and standards relating to rail safety, to be delineated and imposed at the national level. To end the patchwork system of varying state and federal laws and regulations that existed prior to 1970, Congress expressly preempted state and local law in this area in very broad terms, subject only to two narrow exceptions. 45 U.S.C. § 434. The principal exception of continuing importance permits state law to address "essentially local" hazards, but only if such law is not incompatible with federal law and does not unduly burden interstate commerce. The other exception was transitional in nature; it permitted state law to operate only until the Secretary of Transportation had adopted regulations "covering the subject matter" of the state regulation.

Congress adopted this expansive preemption provision in an effort not only to foster "nationally uniform" regulation of rail safety, but to avoid burdensome litigation

over the scope of federal preemption. To these ends Congress specifically rejected an approach that would have required a comparison of the federal and state regulations to see whether the federal requirements were "equal to or higher than" the state requirements.

In considering whether federal and state laws or regulations "cover" the same "subject matter" under the transitional exception, it should suffice that in a broad sense they concern the same subjects. If that is so it should not be necessary, to establish preemption, that the state and federal regulations have the same "purpose" or "objective"—a litigation-provoking concept that would be difficult to establish and easy to manipulate. Nor should it be necessary to conclude that the Secretary and a state regulator have taken precisely the same approach to regulation of an area of rail operations. For preemption, it should also not be necessary to find an actual conflict between the federal and state regulations; of course, the existence of conflict, like similarity of purpose, tends to confirm that the regulations cover the same subject matter. Litigants and courts should not be required to engage in costly, time-consuming trials concerning the operational interaction of the federal and state regulations; again, where the state requirements impair or add to the federal requirements, that will confirm that they cover the same subject matter and that the state requirements are therefore preempted.

If Section 434's preemption of state law "covering the subject matter" of federal law or regulations is not broadly construed, state regulators (or state juries) will continue to attempt to impose on railroads' operations their divergent, often-parochial views of what is desirable and affordable. That would result in the very patchwork of regulations that Congress sought to end when it passed the Federal Railroad Safety Act. It would also precipitate the uncertainty and litigation that Congress sought to avoid in adopting the broad terms of Section 434 and rejecting the "equal to or higher than" standard. The

broad approach to preemption must encompass common law requirements relating to rail safety imposed after-the-fact by judges and juries, since such determinations, where they concern the subject matter of federal regulations, are fundamentally incompatible with the congressional mandate of nationally uniform rail safety standards.

In this case the Court should conclude that the federal statutes, regulations, and standards concerning traffic control devices at grade crossings and train speed cover the same subject matter as the state tort law requirements invoked by Easterwood. In resolving that issue, however, the Court should have in mind the broader array of state-federal disputes that have arisen—such as the roadbed walkways issue presented in No. 91-1423. The Court's holding should be cast in terms broad enough to make clear that state law concerning the same subject as federal regulations and standards is broadly preempted, even if it does not have the same purpose as, or track precisely, the federal requirements, and regardless of whether there is any showing of functional conflict between the state and federal regulations and standards.

ARGUMENT

I. A BROAD VIEW OF THE SUBJECT MATTER PRE-EMPTED BY SECTION 434 IS ESSENTIAL TO ACHIEVE THE NATIONAL UNIFORMITY CONGRESS INTENDED

Since 1970 the federal government has comprehensively regulated safety issues relating to virtually all aspects of railroad operations. As shown in this brief, Congress, in enacting the Federal Railroad Safety Act of 1970 ("FRSA"), provided a strong mandate for national uniformity of rail safety regulation. Nevertheless, state and local governments have promulgated statutes and regulations on a variety of rail safety matters. They have sought to enforce such laws against the railroads that operate within their borders.

The question here is whether federal law preempts a tort plaintiff's arguments that a railroad negligently failed to provide an adequate traffic control device at a grade crossing and that the speed of defendant's train was negligently excessive. The Court's reasoning in this case will provide guidance for resolution of many other federal preemption challenges to attempted state and local regulation of interstate rail safety.

If the Court were to give a narrow scope to preemption under Section 434, the result would be not only to permit the existing efforts of states to overlay their rail safety regulations onto the federal scheme, but, in all likelihood, to encourage even more expansive state efforts in this area. With respect to track roadbed walkways, for example, state imposition and enforcement of regulations going beyond (and interfering with) federal requirements have already resulted in litigation not only in Texas, but in California,² Indiana,³ Michigan,⁴ Ohio,⁵ and Tennessee.⁶ Similar walkways regulations exist in other states.⁷ The Texas Railroad Commission has been particularly insistent about extending its regulatory reach, spawning costly, time-consuming litigation. *Missouri Pacific R.R. Co. v. Railroad Comm'n of Texas*, 653 F. Supp. 617

² *Union Pac. R.R. Co. v. Public Utilities Comm'n of California*, No. 82-5952 (9th Cir. June 27, 1983); *Southern Pacific Transportation Co.*, *supra*.

³ *Black v. Seaboard R.R.*, 487 N.E.2d 468 (Ind. App. 1986); *Black v. Baltimore & Ohio R.R.*, 398 N.E.2d 1361 (Ind. App. 1980).

⁴ *Norfolk & Western Ry. Co. v. Burns*, 587 F. Supp. 161 (E.D. Mich. 1984).

⁵ *Norfolk & Western Ry. Co. v. Public Utilities Comm'n of Ohio*, 926 F.2d 567 (6th Cir. 1991).

⁶ *Illinois Central Gulf R.R. v. Tennessee Public Service Comm'n*, 736 S.W.2d 112 (Tenn. App. 1987).

⁷ See, e.g., Ariz. Corp. Comm'n Admin. Reg. R14-5-405; Mo. Code Regs. tit. 4 § 265-8.110; Nev. Admin. Code ch. 705, § 150 (1987); Or. Rev. Stat. § 761.200, Or. Admin. R. 860-44-210 *et seq.* (1991).

(W.D. Tex.) (granting summary judgment preempting walkway and locomotive equipment rules), *aff'd in part and rev'd in part*, 833 F.2d 570 (5th Cir. 1987) (factual dispute required trial), *on remand*, No. A-86-CA-406 (W.D. Tex. 1990), *aff'd*, 948 F.2d 179 (5th Cir. 1991) (preemption findings after trial upheld), *pet. for cert. pending*, No. 91-1423; *Missouri Pacific R.R. Co. v. Railroad Comm'n of Texas*, 850 F.2d 264 (5th Cir. 1988) (caboose rule preempted), *cert. denied*, 488 U.S. 1009 (1989).⁸

There is ample reason to anticipate even more widespread attempts at state regulation in the rail safety area unless this Court's decision makes clear that the FRSA is broadly preemptive. Additional state regulation would undermine and splinter the national uniformity intended by Congress, resulting in the balkanization of rail safety standards. It would also saddle the Nation's railroads with the uncertainty and unproductive costs involved in complying with or challenging a succession of state law requirements in various jurisdictions.

These problems of non-uniformity, uncertainty and unproductive costs would, of course, be exacerbated insofar as the Court's decision left room for state law to operate, with respect to the subject matter of federal regulation,

⁸ Other states have attempted to regulate in similar areas. See, e.g., *Burlington Northern R.R. v. State of Minnesota*, 882 F.2d 1349 (8th Cir. 1989) (state rule requiring occupied caboose preempted by federal rules concerning power brakes and rear end marking devices); *Burlington Northern R.R. v. State of Montana*, 880 F.2d 1104 (9th Cir. 1989) (state caboose regulation preempted).

Municipalities are also active in efforts to regulate in the rail safety area, as demonstrated by the cases cited in the cross-petition and brief in opposition in No. 91-1206. As one recent example, the city council of Gretna, Louisiana, in May 1992 passed Ordinance No. 2065, which purports to regulate, among other things, the maximum length of time a train may block a grade crossing and the number of cars permitted in a train within the city limits. Compare, e.g., *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945).

by jury verdict or judicial decision. Regulation of railroad safety through common law standards would be particularly destructive of national uniformity because it operates retrospectively and imprecisely. See *Hatfield v. Burlington Northern R.R. Co.*, 958 F.2d 320, 324 (10th Cir. 1992) ("hit-or-miss common law method runs counter to . . . statutory scheme"), *pet. for cert. pending*, No. 91-1977; *Rayner v. Smirl*, 875 F.2d 60, 66 (4th Cir.), *cert. denied*, 493 U.S. 876 (1989) (subjecting railroad safety laws to "unpredictable medley of jury determinations" would be contrary to congressional quest for national uniformity). This form of regulation makes it difficult and costly for railroads to know precisely what are their legitimate state law obligations, how they mesh with federal law requirements, and how they may best be implemented. If railroads are subject to standards based on what a judge or jury might decide in one place or another, the country would surely end up with a "patchwork and jigsaw puzzle[]" of divergent standards, rather than the nationally uniform railroad safety standards intended by Congress.

As explained below, the congressional mandate of national uniformity reflected two important policy decisions concerning all rail safety matters not "essentially local": (1) There should be one set of rules, not 50. (2) The balancing of competing considerations required in any regulatory process should be done at the national level, by the Secretary. By locating rulemaking responsibility at the national level Congress minimized the possibility that railroads would be subjected to varying, uncoordinated rules reflecting parochial interests in the weighing of costs and benefits.⁹ This approach avoids, for example,

⁹ 116 Cong. Rec. 27613 (1970) (remarks of Rep. Pickle).

¹⁰ As indicated in the record in No. 91-1423, the railroads showed in a rulemaking proceeding that the Texas roadbed walkway proposal would entail installation and roadbed modification costs of some \$49 million and additional maintenance costs of over \$1,000,000 an-

the likelihood that individual states would weigh costs and benefits differently than the Secretary and adopt requirements imposing costs and burdens that federal standards would not impose.¹¹

In deciding this case, the Court should recognize Congress's strong mandate for national uniformity in the railroad safety field. It should make clear that Section 434 must be applied in a manner that will give full effect to that mandate.

II. CONGRESS HAS PREEMPTED BROADLY IN THE RAILROAD SAFETY FIELD

In any preemption analysis, "[t]he purpose of Congress is the ultimate touchstone." *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2617 (1992) (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978), and *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963)). To determine congressional intent, courts must look to

nally (Pl. Ex. 16, at 49-72). These state-imposed costs would not only be disproportionate to potential benefits (the cost of injuries from walkways was estimated to be less than \$100,000 annually (Pl. Exs. 3, 14, 15)), but would burden commerce by rendering some railroad operations uneconomic. At least one railroad indicated that it would have to shut down or curtail some of its yards in Texas rather than rebuild them as needed to meet the state requirements (Pl. Ex. RDB-2). Similarly, at one yard alone the California walkway rule required one railroad to spend \$4 million in reconstruction costs, and led to a shutdown of 13 tracks, resulting in continuing delays of as much as a day for traffic that had gone through the yard. *Southern Pacific Transportation Co. v. Public Utilities Comm'n of California*, 647 F. Supp. 1220, 1222 (N.D. Cal. 1986), *aff'd*, 820 F.2d 1111 (9th Cir. 1987) (per curiam).

¹¹ There is heightened concern about the influence of parochial interests when a state is regulating an industry whose members are not headquartered in that state. According to a recent study of the Texas Railroad Commission by Professor Jacqueline Weaver (focusing on oil and gas regulation), the Commission, an elected body, "has favored Texans over non-Texans" and has favored independent local companies over national companies. Weaver & Rago, "Politics and Poker:" *The Texas Railroad Commission*, 17 ABA Admin. L. News 7, 8 (Summer 1992).

"the provisions of the whole law, and its object and policy." *Pilot Life Insurance Co. v. Dedaux*, 481 U.S. 41, 51 (1987). Here, examination of the relevant statute and its "object and policy" reveals that, since 1970, Congress has intended broad preemption of state and local laws and standards in the area of railroad safety.

A. The Statutory Language Broadly Mandates National Uniformity in the Field of Railroad Safety

Congress has explicitly sought national uniformity in the field of railroad safety. In 1970 Congress passed the Federal Railroad Safety Act. That statute conferred broad authority on the Secretary of Transportation to prescribe rules and standards "for all areas of railroad safety." 45 U.S.C. § 431(a). Congress also granted the Secretary a wide range of investigative and enforcement powers designed to help him carry out his responsibilities under the FRSA. 45 U.S.C. §§ 432, 435-39. Congress expressly preempted state and local law. In the opening sentence of the preemption provision of the FRSA, 45 U.S.C. § 434, Congress articulated in expansive terms the goal of national uniformity in the field of railroad safety: "The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable."

It is difficult to imagine a more explicit and comprehensive statement of intent to preempt. Uniformity is to exist not only with respect to laws, rules, and regulations, but also with respect to "orders" and "standards." This terminology is broad enough to encompass common law standards, as well as positive enactments of legislatures and agencies. *Compare Cipollone*, 112 S. Ct. at 2620-21 (plurality opinion) (noting that "requirements" and "prohibitions" are broad terms that encompass common law rules); *id.* at 2634, 2635 (Scalia, J., concurring and dissenting); *Norfolk & Western Ry. Co. v. American Train Dispatchers Ass'n*, 111 S. Ct. 1156, 1163 (1991).

Under Section 434, any law, rule, regulation, order, or standard is preempted so long as it "relat[es] to railroad safety." Again the term "relating to" is expansive, signifying any standard that has a connection with rail safety, even if the effect on rail safety is only indirect. *See Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2038 (1992); *see also id.* at 2037 ("relating to" expresses "a broad preemptive purpose").¹² Finally, the words "*shall be nationally uniform to the extent practicable*" mean that preemption is mandatory and is to occur whenever possible. Preemption is not conditioned on a conflict between state and federal standards or on a finding that the state regulation imposes a burden on commerce, although either would of course be sufficient to result in preemption. In short, the first sentence of Section 434 leaves little room for any deviation from a national standard.

The remaining two sentences of Section 434 provide for the only two limited exceptions to preemption: (1) state regulation where the Secretary of Transportation had not yet adopted a rule or standard "covering the subject matter" of the state requirement; and (2) additional or more stringent state regulation that is necessary to address a particular "essentially local" hazard. Each of these exceptions is narrowly drawn so as not to interfere with Congress's ultimate goal of national uniformity.

By its terms the "covering the subject matter" exception is a temporary measure. It allowed state regulation to survive during the period when the Secretary was conducting studies and formulating comprehensive uniform national regulations. *See Missouri Pacific*, 850 F.2d at 268 n.3 (reading the exception as "indicative of congressional intent that states play an important stopgap

¹² *Compare Pilot Life v. Dedaux*, 481 U.S. at 47-48 (certain common law causes of action constitute "State laws" that "relate to" an employee benefit plan and therefore meet criteria for preemption under ERISA § 514(a)).

role in the safe transition from state to federal regulation of railroads").

The "local hazard" exception for additional or more stringent state regulation is strictly limited in several ways. In order to fit within the exception, a state regulation must be "necessary" to eliminate or reduce a hazard, and that hazard must be "essentially local." Therefore, the hazard in question must be in some way unique, not simply a condition common to many locations. Consistent with Congress's goal of national uniformity, even state regulation of an "essentially local" hazard cannot survive if it either is "incompatible" with any federal regulation or creates an "undue burden" on interstate commerce.¹³

The mandate for national uniformity in Section 434 is part of a remedial scheme and should therefore be liberally construed. See, e.g., *Pinter v. Dahl*, 486 U.S. 622, 653 (1988); *Tcherepin v. Knight*, 389 U.S. 332, 336 (1967). Like most exceptions to broad general statements of policy in remedial legislation, the two exceptions in Section 434 should be read narrowly. Compare, e.g., *Commissioner v. Clark*, 489 U.S. 726, 739 (1989); *A. H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945); *Spokane & Inland Empire R.R. Co. v. United States*, 241 U.S. 344, 350 (1916) (exceptions contained in rail safety statute strictly construed).¹⁴ Indeed, a narrow construction of the exceptions is virtually compelled in view of Congress's mandate that rail safety standards be nationally uniform "to the extent practicable."

¹³ These limitations in the "essentially local" hazard exception make clear that in the preceding portions of Section 434 Congress also intended preemption of any state law or regulation that is incompatible with federal law or regulations.

¹⁴ One court of appeals has characterized the exceptions in Section 434 as authorizing only "a narrow spectrum of deviation from national uniformity . . ." *Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108, 1112 (5th Cir.), cert. denied, 414 U.S. 855 (1973).

B. The History of the FRSA Confirms That Congress Wanted National Uniformity in Railroad Safety Standards

The history of the FRSA confirms the breadth of Congress's mandate for national uniformity. Congress was plainly dissatisfied with the patchwork approach to rail safety that had prevailed before enactment of the FRSA. Following the introduction of proposals for broad federal rail safety legislation, the Secretary of Transportation in 1969 appointed a task force on railroad safety, including representatives of federal and state agencies, the railroads, and labor. The task force found that existing federal statutes and regulations did not reach many aspects of railroad operations and that there was no uniform pattern of state involvement in rail safety matters. As a result, federal and state regulations covered only limited aspects of rail safety. H.R. Rep. No. 91-1194, 91st Cong., 2d Sess. 73 (1970) (Appendix F). The task force concluded that rail safety "requires a more comprehensive national approach." *Id.*

Congress echoed the task force's expression of concern at the lack of uniformity and ineffectiveness of existing regulation. The Senate Committee observed: "Some 95 percent of the causes of accidents on railroads are in no way covered by Federal statutes or by State law." S. Rep. No. 91-619, 91st Cong., 1st Sess. 4 (1969). Congress recognized that, while railroad operations are interstate in nature, there had been no coordinated national effort to remedy the serious rail safety problems that faced the nation. See 116 Cong. Rec. 27611 (1970) (remarks of Rep. Staggers) ("There are no uniform State safety regulations. We have nationwide rail transportation, but we do not have a nationwide rail safety program."); *id.*, at 27615-16 (remarks of Rep. Reed). Congress therefore initiated a comprehensive scheme of federal regulation, including imposition of mandatory standards by

the Secretary of Transportation "at the earliest practicable date." S. Rep. No. 91-619, at 5.

Congress emphasized that the national nature of the railroad industry required both uniform regulation and uniform enforcement:

With the exception of industrial or plant railroads, the railroad industry has very few local characteristics. Rather, in terms of its operations, it has a truly interstate character calling for a uniform body of regulation and enforcement. It is a national system. . . . The integral operating parts of these companies cross many State lines. In addition to the obvious areas of rolling stock and employees, such elements as operating rules, signal systems, power supply systems, and communication systems of a single company normally cross numerous State lines. To subject a carrier to enforcement before a number of different State administrative and judicial systems in several areas of operation could well result in an undue burden on interstate commerce.

H.R. Rep. No. 91-1194, at 13. *See also id.* at 11 ("The committee does not believe that safety in the Nation's railroads would be advanced sufficiently by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems.").

Congress provided specifically for a coordinated effort by the Secretary to solve the grade crossing problem. 45 U.S.C. § 433. It also had in mind many other subjects, including derailments caused by inadequate track and roadbed maintenance, inadequate standards for rail car manufacture and railroad employee safety. *See, e.g.,* S. Rep. No. 91-619, at 3, 30; H.R. Rep. No. 91-1194, at 10. Ultimately, Congress made clear that it was rejecting a piecemeal approach in favor of a comprehensive national effort extending to all aspects of rail safety. *See* S. Rep. No. 91-619, at 5 ("The Secretary of Transportation should have general authority over all areas of rail-

road safety . . ."); 116 Cong. Rec. 27613 (1970) (remarks of Rep. Pickle) (the FRSA "precludes the possibility of 50 different sets of safety regulations from 50 different States . . . [and] take[s] away the potential for patchwork and jig-saw puzzles in the area of railroad safety").

The history of the FRSA makes it clear that the two exceptions to national uniformity stated in Section 434 were to have a narrow application. The second sentence of Section 434, providing that a state may adopt or continue in force a regulation or standard, but only until the Secretary has adopted a regulation or standard "covering the subject matter of such State requirement," was an interim or short-term measure. The House Committee recognized that there were many gaps in the federal regulatory scheme and that the Secretary could not act immediately on all fronts. H.R. Rep. No. 91-1194, at 18.¹⁵ Secretary Volpe explained that "during the period that we are developing national standards present State regulations would remain in effect." *Railroad Safety and Hazardous Materials Control: Hearings on H.R. 7068, H.R. 14417, H.R. 14478, and S. 1933 Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 91st Cong., 2d Sess. 43 (1970) ("1970 House Hearings")*. The Secretary added that the "covering the subject matter" exception would serve "[t]o avoid a lapse in regulation . . . from the mere enactment of a broad authorizing Federal statute . . ." *Id.* at 51.

Eventually, however, it was expected that the Secretary would address all areas relating to rail safety, and a comprehensive federal regulatory scheme would govern.

¹⁵ Section 202(e) of the FRSA required the Secretary to issue initial rail safety regulations, based on existing safety data and standards, within one year from enactment of the FRSA, and thereafter to revise such regulations as necessary. 45 U.S.C. § 431(e).

See 116 Cong. Rec. 27612 (1970) (remarks of Rep. Springer) ("The main idea is to obtain full coverage of all safety programs whether formerly under Federal jurisdiction or otherwise. . . . Uniform regulations must be forthcoming and must be rigidly enforced. - In this regard the bill provides that Federal regulations will override all others.") At that point, the states would be confined to regulating "essentially local" hazards, under the conditions stated in the third sentence of Section 434. See 1970 House Hearings, at 43 (testimony of Secretary Volpe) ("States would remain free to regulate in a given localized area. . . . But other than that, we would preempt the State statutes by the issuance of these national standards."); 116 Cong. Rec. 27612 (1970) (remarks of Rep. Staggers) ("The States may regulate in any area of railroad safety until the Secretary acts. After the Secretary has acted, the States may still regulate with respect to essentially local hazards.").

The "local hazard" exception was to be construed narrowly. It was not to cover statewide conditions, but only "local situations not capable of being adequately encompassed within uniform national standards." H.R. Rep. No. 91-1194, at 19. See also *id.* (under the local hazard exception, "there is no intent to permit a State to establish Statewide standards superimposed on national standards covering the same subject matter").¹⁶

Congress considered, but ultimately rejected, a proposed preemption provision that would have allowed states

¹⁶ The House Committee added the term "essentially" as a modifier to "local hazard" in response to a suggestion by the Association of American Railroads, in order to make clear that the exception referred only to local situations, not to statewide conditions. See 1970 House Hearings, at 114 (testimony of William M. Moloney); H. R. Rep. No. 91-1194, at 2.

to supplement federal regulation in all areas of rail safety. An early version of proposed rail safety legislation, S.1933, provided that state standards would be preempted only if the federal standard was "equal to or higher than" the state standard. *Federal Railroad Safety Act of 1969: Hearings on S.1933, S.2915, and S.3061 Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce*, 91st Cong., 1st Sess. 1 (1969). The Secretary of Transportation and the Federal Railroad Administrator testified that such a provision would be inadvisable, because it would be inconsistent with national uniformity and because it would result in "lengthy litigation to determine the exact effect of the Federal Government's standard in relationship to the existing similar State or local regulation." *Id.* at 340, 343. The Senate Committee subsequently eliminated the "equal to or higher than" standard. Instead, it permitted states to adopt additional or more stringent standards than the federal standards only under the conditions defined by the "essentially local hazard" exception. See S. Rep. No. 91-619, at 8-9.¹⁷

III. TO MEET CONGRESS'S MANDATE FOR NATIONAL UNIFORMITY, THE TRANSITIONAL "COVERING THE SUBJECT MATTER" EXCEPTION MUST BE CONSTRUED NARROWLY

One continuing problem impeding achievement of Congress's goal of nationally uniform regulation of rail safety has been persistent efforts by states and by plaintiffs' attorneys to invoke an expansive reading of the "covering the subject matter" exception. These efforts have resulted in uncertainty and costly litigation, in which some courts

¹⁷ The House Committee likewise considered and rejected the "equal to or higher than" language. Compare 1970 House Hearings, at 2, with H.R. Rep. No. 91-1194, at 2.

have thought it necessary or appropriate to engage in a detailed comparison of the terms of the federal and state regulations, in order to determine whether they are similar in purpose, match precisely in their content and approach, or involve functional conflicts. See, e.g., *Missouri Pacific*, 948 F.2d at 183-84 (analyzing functional relationship of regulations); *Southern Pacific*, 647 F. Supp. at 1224-25 (analyzing content and comparing regulatory objectives). While state regulations that have the same purpose, match in content, or conflict with federal rail safety regulations would certainly be preempted at a minimum, the purposes of Section 434 require preemption even without such a showing.

A. The "Covering the Subject Matter" Exception Is a Transitional Measure that Lacks Continuing Force

As explained in Part II, the "covering the subject matter" exception is a stopgap measure, designed to avoid a regulatory vacuum during the transitional period immediately following passage of the FRSA when the Secretary was conducting studies and drafting regulations. This interpretation is consistent with the structure and language of the statute, as well as the overriding legislative purpose. Once a comprehensive federal regulatory scheme was in place, state regulation should be largely or entirely confined to "essentially local" hazards, since a multiplicity of state standards would defeat Congress's overall goal of national uniformity.

Within the year following enactment of FRSA, and thereafter, the Secretary adopted hundreds of federal rail safety regulations and standards covering in detail virtually all aspects of rail operations, including traffic control devices at grade crossings and train speed. See 49 C.F.R. Ch. II; 23 C.F.R. Chs. I, II.¹⁸ By now, more than

¹⁸ Other subjects covered by the Secretary's regulations include rail safety enforcement procedures, track safety standards, freight car standards, operating rules and practices, alcohol and drug use,

20 years after enactment of the FRSA, the Secretary has "cover[ed]" virtually every "subject matter" within the meaning of Section 434. At this point, the field of rail safety should be governed essentially by federal rail safety standards, thereby fulfilling the mandate for national uniformity stated in the first sentence of Section 434. One federal court of appeals has explicitly recognized that there should now be little, if any, scope for the application of the "covering the subject matter" exception. In finding preemption of a state requirement of cabooses not required by federal regulations the Fifth Circuit noted:

The FRSA has been in effect eighteen years. If there remain non-local matters of railroad safety open for state regulation, they do not include areas in which the FRA has chosen not to act.

Missouri Pacific, 850 F.2d at 268 n.3.¹⁹

B. Assuming the "Covering the Subject Matter" Exception Continues to Have Some Force, It Should Be Interpreted to Preserve Broad Preemption

1. Reading the Exception to Preserve Broad Preemption Best Serves the Purpose and Language of the Statute

Assuming *arguendo*, however, that the second sentence of Section 434 has some continuing vitality even when a comprehensive federal regulatory scheme is in place, the phrase "covering the subject matter" should be interpreted and applied to meet Congress's overall mandate

radio procedures, rear end marking devices, safety glazing standards, accident reporting, signal systems reporting, signal and train control systems, and locomotive engineer qualifications. 49 C.F.R. Pts. 209, 213, 215, 217-21, 223, 225, 233, 236, 240.

¹⁹ Other courts that have ruled on rail safety preemption issues have applied Section 434 without considering whether the "covering the subject matter" exception should be viewed as lacking continuing force. Most courts appear to have merely assumed that the exception continues to apply.

for national uniformity "to the extent practicable." In construing this remedial legislation, courts should take a liberal approach to determining when the Secretary has "cover[ed]" the subject of a state regulation. The alternative approach—a niggling construction that would require courts to engage in a painstaking search for gaps in the federal scheme and that would permit state regulation in these interstices—would produce the very patchwork that Congress sought to avoid in passing the FRSA.

The statute itself does not provide any basis for taking a restrictive view of the circumstances in which the Secretary has "cover[ed] the subject matter" of a state requirement. These words are not technical in nature. They do not suggest that the Secretary must regulate in a particular manner in order to trigger preemption.²⁰ Nor does the term "subject matter" denote a specific classification of subjects against which the regulations in question must be matched. The words do not dictate the use of narrow, artificial distinctions among related aspects of rail operations.

2. The Existence of Different Regulatory Objectives Should Not Bar a Finding of Preemption

The fact that the Secretary and a state may have had different regulatory objectives certainly should not bar a finding that the Secretary has "cover[ed] the subject matter" of a state regulation. In this case Easterwood argued that the Secretary's regulations concerning train speed did not cover the same subject matter as a state law negligence claim because, she asserted, the federal regulations had a different purpose (avoiding derailment) than the common law of negligence (avoiding a collision).

²⁰ Indeed, Congress indicated that to "cover" a subject matter a regulation need do no more than to "concern" it. S. Rep. No. 91-619, at 9 (under § 434 state requirements are "preempted by Federal action concerning the same subject matter").

See Cross-Petition, No. 91-790, at 5.²¹ The court of appeals rejected that argument as being at odds with this Court's decisions and also noted the difficulty in establishing the purpose of regulations. Pet. App. 8a. In litigation concerning roadbed walkways, however, the Fifth and Ninth Circuits have divided on this issue. Compare *Missouri Pacific*, 833 F.2d at 574 (same purpose not required), with *Southern Pacific*, 647 F. Supp. at 1225 (same purpose required). The positions taken by the courts of appeals in this case and in *Missouri Pacific* are correct.

This Court has long held that the underlying purpose of a state regulation is not controlling in the determination whether the regulation is preempted:

The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced *without impairing the federal superintendence of the field*, not whether they are aimed at similar or different objectives.

Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963) (emphasis added). See also *Gade v. National Solid Wastes Management Ass'n*, 112 S.Ct. 2374, 2387 (1992); *Perez v. Campbell*, 402 U.S. 637, 651-52 (1971); *Napier v. Atlantic Coast Line R.R. Co.*, 272 U.S. 605, 612-13 (1926). Congress can be presumed to have been aware of this principle when it enacted the FRSA. See, e.g., *Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.*, 112 S.Ct. 2447, 2457-58 (1992); *United States Dep't of Energy v. Ohio*, 112 S.Ct. 1627, 1633 (1992); *McNary v. Haitian Refugee Center, Inc.*, 111 S.Ct. 888, 898 (1991). Congress similarly knew that courts are reluctant to delve into the objectives of regu-

²¹ Similarly, Easterwood attempted to characterize federal regulations concerning grade crossing as having purposes relating only to funding. See Brief in Opposition, No. 91-790, at 5-8.

lators, given the difficulty of making such determinations. See, e.g., *Palmer v. Thompson*, 403 U.S. 217, 224-25 (1971); *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968); Pet. App. 8a (court of appeals notes that "guess[ing] at the motives behind [regulation] . . . is inherently suspect").

Had it intended courts to find identical regulatory objectives in order for there to be preemption under Section 434, Congress surely would have made this explicit. However, nothing in that provision suggests that regulatory objectives should govern the outcome of the preemption analysis.²² The phrase "covering the subject matter" on its face does not express any need for a common regulatory objective. It indicates merely that there must be an overlap or relationship between the subject matter of the federal regulation and the subject matter of the state requirement in order for preemption to occur.

Moreover, if state regulations could stand whenever the state could demonstrate a regulatory objective different from that of the Secretary, they could apply even though they conflict or are otherwise incompatible with federal regulations.²³ There would be nothing left of national uniformity. States (or localities or juries) would ordinarily have some objectives that are different from those of the Secretary, since each would be likely to be responding to a separate set of interests. A state that wished to circumvent Congress's intent to preempt could merely

²² Of course, a similarity of objectives would tend to confirm the conclusion that federal and state regulations "cover[]" the same "subject matter." See, e.g., *Burlington Northern*, 880 F.2d at 1106-08.

²³ As the courts found in the Texas walkways case, even if it had different objectives the state regulation was incompatible with the federal roadbed requirements because, in operation, walkways are an integral part of track support structures, and the state requirements in fact added to and even impaired the federal requirements. See *Missouri Pacific*, 948 F.2d at 183-85.

articulate a different objective from the one that appears to underlie the federal regulation. See, e.g., *Perez v. Campbell*, 402 U.S. at 652; *Missouri Pacific*, 833 F.2d at 574. Federal superintendence of the railroad safety field would be thwarted by such an interpretation.

3. Regulation in the Same Manner or to the Same Extent Should Not Be Required for a Finding of Preemption

It also should not be necessary for a state and the Secretary to have regulated an area in precisely the same manner or to the same extent in order for the Secretary to have "cover[ed] the subject matter" of the state regulation. The statutory language does not on its face require precise congruence. That construction would mean that the Secretary could not achieve the mandated goal of national uniformity unless federal regulations incorporated virtually all aspects of existing or potential regulations of all the states. That is the antithesis of what Congress had in mind. Indeed, it would be equivalent to the "equal to or higher than" approach that Congress rejected. See page 17, *supra*.

Moreover, Congress did not require that the Secretary regulate in the very same manner in order to trigger preemption. The reason for this is obvious: in most cases the Secretary and a state agency (or a local agency, court, or jury) would not be likely to take the same approach to a subject. A state or local body can be expected to take a more parochial view than the Secretary, who ordinarily must balance a broader group of concerns. In addition, the regulatory scheme that is likely to be most appropriate on a national scale may be inadvisable or even infeasible on the state or local level, and vice versa.

The matters at issue in this case present prime examples of how the Secretary has taken a very different regulatory approach than could be expected from states

and localities (including courts and juries). In response to the provisions of the FRSA and other congressional directives, the Secretary administers a comprehensive federal scheme under which state agencies, acting pursuant to delegated authority, are responsible for determining the need for traffic control devices following a survey of grade crossings within the state. The state agencies develop criteria for evaluating what type of equipment is appropriate for each grade crossing and the order in which improvements should be made, taking into account the conditions at all grade crossings within the state. The factors considered by a state agency can include number of tracks, sight distance, the volume of traffic at a crossing, the speed of trains passing through a crossing, and much more. See 23 C.F.R. Pts. 646, 655, 924, 1204.²⁴

The jury in a tort case takes a much different approach. It applies a common law standard of care, with a focus on the consequences of a single accident at a particular grade crossing. The jury operates with the benefit of hindsight, and, because such cases often involve local residents who experience tragic injuries, they are ordinarily fraught with emotion. A jury is unlikely to consider matters such as the effect of requiring slower train speeds on interstate commerce (and the likelihood that slower speeds would actually lead to more grade crossing accidents) and the need for finite resources to be allocated to other higher-priority grade crossings within the state.

The approaches taken by the Secretary and a local jury are very different. Nevertheless, it should be clear that the Secretary has "cover[ed] the subject matter" of train speed and the need for traffic control devices at grade

²⁴ The briefs submitted by CSXT and the Association of American Railroads describe in detail the work of the state agencies in the federal grade crossing safety program.

crossings. That is enough to preempt state common law standards on this subject.²⁵

4. Determining That the Secretary Has "Covered" a "Subject Matter" Should Not Require a Complicated Showing

Determining whether the Secretary has "cover[ed] the subject matter" of a state regulation should be a straightforward exercise. Yet in the Texas walkways case the railroads were required to engage in extensive litigation in persuading the courts that state specifications for roadbed walkways were preempted. A walkway is an area on the side of a railroad track, structurally incorporated into the roadbed that supports the track structure. The Secretary's rail safety regulations include a section entitled "Track Safety Standards," 49 C.F.R. Pt. 213. Subpart B, entitled "Roadbed," "prescribes minimum requirements for roadbed and areas immediately adjacent to roadbed." 49 C.F.R. § 213.31. Subpart D is entitled "Track Structure." The Secretary's regulations do not use the word "walkways" and do not impose the sorts of specifications that are contained in the state regulations.

A dozen witnesses testified at the trial in the Texas walkways case. Extensive expert testimony showed that the roadbed would have to be enlarged and strengthened in order to support the walkway, that the material used to support the walkways would be integrated with the roadbed and would in essence constitute an extension of it, and that the addition of walkways would impair drainage and weaken the track support structures. See *Mis-*

²⁵ The court of appeals in this case did not provide a full analysis of the "covering the subject matter" issue, apparently because it believed that the Secretary's grade crossing regulations were not promulgated under his authority to regulate rail safety and that the exception therefore did not apply. We believe the court's conclusions on these points were in error, as discussed in the submissions of CSXT and AAR.

souri Pacific, 948 F.2d at 183-84. That evidence was certainly sufficient to support the conclusion that the Texas regulation was preempted. Where a state regulation conflicts with, adds to, or is otherwise incompatible with a federal regulation, the regulations surely must be deemed to "cover[]" the same "subject matter" for purposes of Section 434.

However, courts should not have to engage in such a complicated factual analysis. Congress expected that national uniformity would prevail in the rail safety area and that "lengthy litigation" would not be needed to determine the scope of federal preemption. Rather than identifying fine distinctions based on narrow (and often artificial) categories of rail operations (*e.g.*, roadbeds v. walkways) and then analyzing the interrelationships between the categories and evaluating the effect of the state regulation in question, it should be enough for a court to examine the Secretary's regulations and conclude that in a general sense they address the relevant area of rail operations. For example, in the case of state walkways regulation, a court should be able to conclude that the Secretary has "cover[ed]" the subject matter" by regulating the broad area of "track safety standards" (including roadbed and track structure standards). *See Black v. Seaboard System R.R.*, 487 N.E.2d at 469; *Black v. Baltimore & Ohio R.R.*, 398 N.E.2d at 1363. *See also Norfolk & Western*, 926 F.2d at 570-71.

If the Court concludes that the "covering the subject matter" exception has any continuing vitality, it should adopt a broad approach to determining when the Secretary has "cover[ed]" a particular "subject matter." Only that approach will serve Congress's goal of avoiding lengthy litigation concerning the scope of preemption. Moreover, the broad approach is essential in order to avoid the "patchwork" that Congress rejected in passing the FRSA and to serve Congress's goal of achieving national uniformity "to the extent practicable."

CONCLUSION

The Court should reverse in No. 91-790 and affirm in No. 91-1206.

Respectfully submitted,

CAROLYN F. CORWIN
CECILY E. McCOWEN
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

ROBERT BRIAN BURNS, JR.
WILSON, GROSENHEIDER & BURNS
P.O. Box 1584
Austin, Texas 78767
(512) 478-1657

*Counsel for Amici Curiae
Texas Class I Railroads*

PAUL A. CUNNINGHAM
GERALD P. NORTON *
PEPPER, HAMILTON & SCHEETZ
1300 - 19th Street, N.W.
7th Floor
Washington, D.C. 20036
(202) 828-1200

August 27, 1992

* Counsel of Record

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IN THE
Supreme Court of the United States OF THE CLERK
OCTOBER TERM, 1992

CSX TRANSPORTATION, INC.,
v. *Petitioner,*

LIZZIE BEATRICE EASTERWOOD,
Respondent.

LIZZIE BEATRICE EASTERWOOD,
v. *Cross-Petitioner,*

CSX TRANSPORTATION, INC.,
Cross-Respondent.

On Writs of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

**BRIEF AMICUS CURIAE OF THE ASSOCIATION
OF AMERICAN RAILROADS IN SUPPORT OF
PETITIONER/CROSS-RESPONDENT
CSX TRANSPORTATION, INC.**

JOHN H. BROADLEY
DONALD B. VERRILLI, JR.*
JOHN B. MORRIS, JR.
JENNER & BLOCK
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

ROBERT W. BLANCHETTE
Vice President-Law and
General Counsel
ASSOCIATION OF AMERICAN RAILROADS
American Railroads Building
50 F Street, N.W.
Washington, D.C. 20001
(202) 639-2505
Counsel for Amicus

August 27, 1992

* Counsel of Record

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS	1
STATEMENT OF THE CASE	3
ARGUMENT	5
I. SECTION 434 PRE-EMPTS STATE NEGLIGENCE CLAIMS BASED ON A RAILROAD'S ALLEGED FAILURE TO INSTALL AN APPROPRIATE TRAFFIC CONTROL DEVICE AT A GRADE CROSSING	7
A. Federal Law Covers the Subject of Grade Crossing Traffic Control Devices	8
1. The Highway Grade Crossing Program....	8
2. Uniform Federal Standards	10
B. State Tort Claims Premised on Allegedly Inadequate Traffic Control Devices Frustrate the Federal Regulatory Program	13
II. SECTION 434 PRE-EMPTS STATE NEGLIGENCE CLAIMS BASED ON TRAIN SPEED..	19
A. The Secretary has Directly Regulated Train Speed, and Claims Based on Speed are Thus Pre-empted	19
B. Pre-emption of Claims Based on Train Speed at Grade Crossings is Consistent With Public Policy Because Train Speed is an Integral Part of the Grade Crossing Safety Resource Allocation Determination	20
CONCLUSION	27

TABLE OF AUTHORITIES

Cases	Page
<i>Allis-Chalmers Corp. v. Lueck</i> , 471 U.S. 202 (1985)	5
<i>Armijo v. Atchison, Topeka & Santa Fe Ry. Co.</i> , 754 F. Supp. 1526 (D.N.M. 1990)	5, 20
<i>Burlington Northern Railroad Co. v. State of Montana</i> , 880 F.2d 1104 (9th Cir. 1989)	20
<i>Cipollone v. Liggett Group, Inc.</i> , 112 S. Ct. 2608 (1992)	6
<i>City of Covington v. Chesapeake & Ohio Ry. Co.</i> , 708 F. Supp. 806 (E.D. Ky. 1989)	19
<i>CSX Transp., Inc. v. City of Tullahoma, Tenn.</i> , 705 F. Supp. 385 (E.D. Tenn. 1988)	19
<i>CSX Transp., Inc. v. Public Utilities Comm'n of Ohio</i> , 901 F.2d 497 (6th Cir. 1990), cert. denied, 111 S. Ct. 781 (1991)	13
<i>CSX Transp., Inc. v. Thorsby, Ala.</i> , 741 F. Supp. 889 (M.D. Ala. 1990)	19
<i>Eastwood v. CSX Transp., Inc.</i> , 933 F.2d 1548 (11th Cir. 1991)	3
<i>Gade v. National Solid Wastes Management Ass'n</i> , 112 S. Ct. 2374 (1992)	5
<i>Hatfield v. Burlington Northern R. Co.</i> , 958 F.2d 326 (10th Cir. 1992), petition for cert. filed, 60 U.S.L.W. 3860 (U.S. June 8, 1992) (No. 91-1977)	17
<i>Illinois v. City of Milwaukee</i> , 406 U.S. 91 (1972)	7
<i>Ingersoll-Rand Co. v. McClendon</i> , 111 S. Ct. 478 (1990)	5
<i>Mackey v. Lanier Collection Agency & Service, Inc.</i> , 486 U.S. 825 (1988)	20
<i>Metropolitan Life Ins. Co. v. Massachusetts</i> , 471 U.S. 724 (1985)	6, 20
<i>Morales v. Trans World Airlines, Inc.</i> , 112 S. Ct. 2031 (1992)	6, 20
<i>Napier v. Atlantic Coast Line R. Co.</i> , 272 U.S. 605 (1926)	20
<i>Nashville, C. & St. L. Ry. v. Walters</i> , 294 U.S. 405 (1935)	14
<i>New York and N.E. Ry. v. Town of Bristol</i> , 151 U.S. 556 (1893)	14

TABLE OF AUTHORITIES—Continued

	Page
<i>Norfolk & W. R. Co. v. Train Dispatchers</i> , 111 S. Ct. 1156 (1991)	7
<i>Pilot Life Ins. Co. v. Dedeaux</i> , 481 U.S. 41 (1987) ..	6
<i>San Diego Building Trades Council v. Garmon</i> , 359 U.S. 236 (1959)	7
<i>Shaw v. Delta Airlines, Inc.</i> , 463 U.S. 85 (1983)	6
<i>Sisk v. National R.R. Passenger Corp.</i> , 647 F. Supp. 861 (D. Kan. 1986)	4, 19
<i>Southern Pacific Transp. Co. v. St. Charles Parish Policy Jury</i> , 569 F. Supp. 1174 (E.D. La. 1983) ..	23, 24
<i>Union Pacific Ry. Co. v. Public Utility Comm'n of Oregon</i> , 723 F. Supp. 526 (D. Ore. 1989)	5
<i>United States v. Chicago, Burlington & Quincy Ry. Co.</i> , 412 U.S. 401 (1973)	14
<i>Statutes and Regulations</i>	
48 Stat. 195	14
49 Stat. 115	14
49 Stat. 1519	14
52 Stat. 638	14
54 Stat. 867	14
58 Stat. 838	14
23 U.S.C. § 109(d)	11
23 U.S.C. § 130	7, 8, 9
23 U.S.C. § 402(a)	11
29 U.S.C. § 1144(a)	6
45 U.S.C. § 421	3
45 U.S.C. § 433(b)	13
45 U.S.C. § 434	3, 4, 5
49 U.S.C. § 1305	6
23 C.F.R. Part 924	8, 9
23 C.F.R. § 646.200	8, 11, 13
23 C.F.R. § 646.210	9, 13
23 C.F.R. § 646.214	11, 12, 13
23 C.F.R. § 655.603	11, 13
23 C.F.R. § 924.9	8, 10, 13
23 C.F.R. § 1204.4	8, 13
49 C.F.R. Part 213	19, 26
49 C.F.R. § 1.48(o)	13
49 C.F.R. § 213.9	3
49 C.F.R. § 229.125	22

TABLE OF AUTHORITIES—Continued

<i>Miscellaneous</i>	Page
H.R. Rep. No. 91-1194, 91st Cong., 2d Sess. (1970), reprinted in 1970 U.S.C.C.A.N. 4104	16
Prevention of Rail-Highway Grade-Crossing Acci- dents Involving Railway Trains and Motor Vehi- cles, 322 I.C.C. 1 (1964)	14, 15, 16, 21
FEDERAL HIGHWAY ADMINISTRATION, U.S. DEP'T OF TRANSPORTATION, DRIVER BEHAVIOR AT RAIL- HIGHWAY CROSSINGS (FHWA Project No. DTFH61-88-Z-00145, March 1989)	22
FEDERAL HIGHWAY ADMINISTRATION, U.S. DEP'T OF TRANSPORTATION, MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES (1988)	11, 25
FEDERAL HIGHWAY ADMINISTRATION, U.S. DEP'T OF TRANSPORTATION, RAIL-HIGHWAY CROSSINGS STUDY (1989)	<i>passim</i>
FEDERAL HIGHWAY ADMINISTRATION, U.S. DEP'T OF TRANSPORTATION, RAILROAD-HIGHWAY GRADE CROSSING HANDBOOK (2d ed. 1986)	<i>passim</i>
FEDERAL RAILROAD ADMINISTRATION, U.S. DEP'T OF TRANSPORTATION, RAIL-HIGHWAY CROSSING ACCIDENT/INCIDENT AND INVENTORY BULLETIN (No. 13, Calendar Year 1990, July 1991)	2, 17, 23, 24
FEDERAL RAILROAD ADMINISTRATION & FEDERAL HIGHWAY ADMINISTRATION, U.S. DEP'T OF TRANSPORTATION, RAIL-HIGHWAY CROSSING RE- SOURCE ALLOCATION PROCEDURE USER'S GUIDE (3d ed. 1987)	10, 17
David Schoppert & Dan Hoyt, Factors Influencing Safety at Highway-Rail Grade Crossings (Na- tional Cooperative Highway Research Program Report No. 50, Highway Research Board, Na- tional Academy of Sciences, 1968)	16, 18, 23

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United States Court of Appeals
for the Eleventh Circuit

**BRIEF AMICUS CURIAE OF THE ASSOCIATION
OF AMERICAN RAILROADS IN SUPPORT OF
PETITIONER/CROSS-RESPONDENT
CSX TRANSPORTATION, INC.**

INTEREST OF AMICUS

The Association of American Railroads ("AAR") is a non-profit trade association representing the Nation's major railroads.¹ Its members account for approximately

¹ The parties have consented to the filing of this brief *amicus curiae*. Letters memorializing their consent have been filed with the Clerk of the Court.

85 percent of the line haulage, employ 90 percent of the workers, and produce approximately 93 percent of the freight revenues of all railroads in the United States. AAR represents its member railroads in matters of common interest before Congress, regulatory agencies, and in an *amicus* capacity before courts.

Safety at grade crossings is a matter of great concern to AAR and its member railroads. Indeed, AAR has taken a particular institutional interest in the issue. As of 1990, there were 176,572 public grade crossings nationwide.² AAR has cooperated with the U.S. Department of Transportation ("DOT") to develop and complete an inventory of each of these grade crossings. The DOT/AAR inventory serves as the principal data base for state efforts to improve grade crossing safety pursuant to a cooperative state-federal regulatory scheme, discussed more fully below.

This case raises pre-emption issues that bear directly on the continued efficacy of that highly successful regulatory program, in which the roles of the railroads and of government—federal, state, and local—are clearly defined. The case also raises related pre-emption issues that bear directly on the proper balance between federal authority on the one hand and state and local authority on the other with respect to regulating train speed at grade crossings.

AAR fears that a failure to give full effect to federal pre-emption in the areas of train speed and the adequacy of grade crossing protection will seriously impede further progress in railroad safety. As Congress has explicitly recognized, federal pre-emption is often the only

² FEDERAL RAILROAD ADMINISTRATION, U.S. DEPT OF TRANSPORTATION, RAIL-HIGHWAY CROSSING ACCIDENT/INCIDENT AND INVENTORY BULLETIN 45 (No. 13, Calendar Year 1990, July 1991) ("DOT CROSSING INVENTORY"). In addition, there are over 115,000 private grade crossings—where tracks cross private roads on private property. *Id.*

rational method of assuring an efficient and safe national rail system.³

STATEMENT OF THE CASE

This case arises out of a grade crossing accident in Cartersville, Georgia, involving a train operated by Petitioner CSX Transportation, Inc. ("CSXT"). The principal issue is whether the Federal Railroad Safety Act of 1970 ("FRSA"), 45 U.S.C. § 421 *et seq.*, pre-empts state common law claims of negligence based on allegations that CSXT (i) failed to install an automatic traffic gate at the crossing where the accident at issue occurred; and (ii) operated its train at an excessive speed as it passed through the crossing.⁴

³ Federal pre-emption of claims of negligence based on train speed or the adequacy of grade crossing traffic control devices does not exonerate railroads from their proper safety responsibilities. In some circumstances, a state negligence claim may lie against a railroad. For example, as the court below noted, federal law does not pre-empt all claims that a railroad negligently failed to trim vegetation near its tracks, and thereby caused a safety hazard. *See Easterwood v. CSX Transp., Inc.*, 933 F.2d 1548, 1554 (11th Cir. 1991). There are other instances, such as if a train fails to sound its whistle at the appropriate times, in which railroads do not seek findings of pre-emption.

⁴ On June 3, 1988, Respondent sued CSXT, claiming various breaches of the common law tort duty of care with respect to the crossing. CSXT sought dismissal of the allegations regarding speed and adequacy of grade crossing traffic control devices on the ground that federal law pre-empted the state tort claims. The district court agreed, and granted summary judgment. The Eleventh Circuit affirmed in part and reversed in part. The court of appeals agreed that Section 434 of FRSA, 45 U.S.C. § 434, pre-empts Respondent's negligence claim that the CSXT train was travelling at an excessive speed. Section 434 explicitly pre-empts state laws when federal regulation "covers the subject" of such laws, and the federal track speed regulations set forth at 49 C.F.R. § 213.9 cover the subject of maximum train speed. The court concluded, however, that federal regulations respecting grade crossing traffic control devices did not pre-empt Respondent's claim that CSXT was negligent by not having a different grade crossing traffic control device.

Section 434 of the FRSA expressly pre-empts state law whenever the United States Secretary of Transportation has promulgated a "rule, regulation, order, or standard covering the subject matter" of the state law. 45 U.S.C. § 434. Applying this test, the court of appeals held that Section 434 did not pre-empt Respondent's claim that CSXT should have installed an automatic traffic gate at the crossing, but that Section 434 did pre-empt Respondent's claim that CSXT's train was travelling at an excessive speed.

The appeals court's analysis reflects a serious misunderstanding of the federal regulatory regime governing grade crossing safety. The court failed to comprehend that federal law has replaced the *ad hoc* fault-based system of private tort law, based upon hindsight, with a system of public planning, spending, and regulation to improve crossing safety prospectively. By law, public authorities make all decisions about whether automatic gates or other traffic control devices are needed at particular grade crossings, and allocate funds as needed to implement those decisions. As one court put it, "[i]n conjunction with the national regulation of railroad safety, Congress determined that grade crossing improvements were a governmental responsibility rather than the responsibility of the railroads." *Sisk v. National R.R. Passenger Corp.*, 647 F. Supp. 861, 863 (D. Kan. 1986).

That misunderstanding is most evident in the appeals court's erroneous ruling that Section 434 did not pre-empt state tort claims based on an alleged negligent failure to install an automatic traffic gate at a grade crossing. Pursuant to extensive federal regulations, state public authorities decide whether such devices should be installed at grade crossings, and in what order of priority.

Similarly, though reaching a correct result with respect to the excessive speed claim, the appeals court took into account only a part of the federal regulatory scheme at issue, and failed to acknowledge that federal regulation of

grade crossing traffic control devices necessarily encompasses regulation of train speed at grade crossings.

ARGUMENT

"[T]he question whether a certain state action is pre-empted by federal law is one of congressional intent." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985); see also *Gade v. National Solid Wastes Management Ass'n*, 112 S. Ct. 2374 (1992). In a pre-emption case, as in any other statutory interpretation case, ascertaining congressional intent requires careful attention to "the explicit statutory language and the structure and purpose of the statute." *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478, 482 (1990).

Section 434 of the FRSA is the pre-emption provision at issue. It provides:

The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement.

45 U.S.C. § 434.⁵

⁵ This case does not present a situation in which a state availed itself of its ability under § 434 to "adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce." 45 U.S.C. § 434. The statewide tort law at issue in this case does not qualify as a rule relating to a "local safety hazard." See, e.g., *Armijo v. Atchison, Topeka & Santa Fe Ry. Co.*, 754 F. Supp. 1526, 1532-33 (D.N.M. 1990); *Union Pacific Ry. Co. v. Public Utility Comm'n of Oregon*, 723 F. Supp. 526, 529-30 (D. Ore. 1989).

This statutory language could hardly be more expansive. Section 434 does not merely pre-empt state laws that directly regulate rail safety. Rather, once federal regulation covers a subject involving rail safety, Section 434 pre-empts all state law “relating to” that subject. This Court recently made clear in *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031 (1992), that “[t]he ordinary meaning” of the phrase “relating to” in a pre-emption provision “is a broad one,” and that the “relating to” language must be read to pre-empt all state law “having a connection with or reference to” a covered subject. *Id.* at 2038 (citation omitted).⁶ The dispositive issue in this case, therefore, is whether the tort duties Respondent seeks to enforce “hav[e] a connection with or reference to” subjects covered by federal regulations. See *Morales*, 112 S. Ct. at 2037.⁷

⁶ In *Morales*, the Court interpreted Section 1305 of the Airline Deregulation Act of 1978, 49 U.S.C. § 1305, which expressly pre-empted all state law “relating to airline rates, routes, or services.” The Court drew on its prior decisions interpreting the express pre-emption provision contained in ERISA, 29 U.S.C. § 1144(a), which pre-empted state laws that “relate to” employee benefit plans. Because the natural meaning of the statutory phrase has a “broad scope,” *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985), and an “expansive sweep,” *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47 (1987), the ERISA pre-emption provision has likewise been interpreted to pre-empt all state law “having a connection with or reference to” employee benefit plans. *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 97 (1983).

⁷ Section 434 pre-empts state common law negligence claims—like those at issue here—as well as affirmative state regulation. Section 434 expressly pre-empts all state “laws.” In *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992), Justice Stevens’ opinion made clear that “since *Erie R. Co. v. Tompkins* . . . we have recognized the phrase ‘state law’ to include common law as well as statutes and regulations.” *Id.* at 2620 (plurality opinion) (citation omitted). *Cipollone* emphasized that even the statutory phrase at issue there—“requirements or prohibitions”—which is much narrower than the expansive language of Section 434, “sweeps broadly and suggests no distinction between positive enactments and common law; to the

As will be shown, Section 434 pre-empts state negligence law covering CSXT’s duty to install an automatic traffic gate because any common law duty to do so plainly has a “connection with or reference to” a subject covered by federal regulation. Federal regulations establish a comprehensive program, in cooperation with state and local authorities, for determining what traffic control devices must be placed at grade crossings, and in what priority. (Point I).

Section 434 also pre-empts state negligence law imposing a duty to reduce train speed because federal regulations expressly cover the subject by specifically prescribing maximum train speed. Train speed is, moreover, an important factor in determining what traffic control devices are required at grade crossings. Pre-emption of state negligence claims based on excessive speed is thus fully consistent with the safety objectives of public policy. Indeed, under Section 434, federal regulation covering the subject of traffic control devices independently pre-empts state negligence law to the extent state-imposed duties purport to regulate train speed at grade crossings. (Point II).

I. SECTION 434 PRE-EMPTS STATE NEGLIGENCE CLAIMS BASED ON A RAILROAD’S ALLEGED FAILURE TO INSTALL AN APPROPRIATE TRAFFIC CONTROL DEVICE AT A GRADE CROSSING.

Federal law has plainly covered the subject of grade crossing traffic control devices. DOT’s “Grade Crossing Program” established pursuant to 23 U.S.C. § 130 requires States to adopt methods to determine which cross-

contrary, the words easily encompass obligations that take the form of common law rules.” *Id.* (citation omitted). See also *id.* at 2632 (Scalia, J., dissenting); *Norfolk & W. R. Co. v. Train Dispatchers*, 111 S. Ct. 1156, 1163-64 (1991); *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 246-47 (1959).

ings pose particular hazards, and to plan, establish priorities for, and implement crossing safety improvement projects. *See generally* 23 C.F.R. Part 924. (Point I.A.1). DOT's promulgation of the Manual on Uniform Traffic Control Devices, and regulations requiring compliance with it, 23 C.F.R. § 646.200, establish uniform national standards in the context of a specific and comprehensive scheme for regulating grade crossing safety devices. (Point I.A.2). Indeed, permitting tort claims of the kind at issue here would be antithetical to the purpose and operation of the federal regulatory regime. (Point I.B.).

A. Federal Law Covers the Subject of Grade Crossing Traffic Control Devices.

1. The Highway Grade Crossing Program.

In 1973, Congress amended the Federal Highway Safety Act to mandate that

[e]ach State shall conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose.

23 U.S.C. § 130(d); *see also* 23 C.F.R. § 924.9; 23 C.F.R. § 1204.4 Highway Safety Program Guideline No. 12(G).

The DOT "Grade Crossing Program" established pursuant to Section 130 requires States to adopt methods for determining which crossings pose particular hazards, to establish priorities for installing traffic control devices, and to implement safety improvement projects for crossings. *See generally* 23 C.F.R. Part 924. As a result of Section 130, therefore, public authorities are responsible for administering as well as funding grade crossing safety programs.⁸

⁸ Congress has appropriated to the States federal funds "for the elimination of hazards of railway-highway crossings," at least

The extensive scope of this federally-mandated system demonstrates that federal regulation covers the subject of grade crossing traffic control devices. In response to recommendations in DOT's 1972 report to Congress, "the U.S. DOT/AAR National Rail-Highway Crossing Inventory was developed . . . through the cooperative efforts of the Federal Highway Administration (FHWA), Federal Railroad Administration (FRA), Association of American Railroads (AAR), individual States, and individual railroads."⁹ The DOT/AAR crossing inventory, which forms the basis for state plans to improve grade crossing safety, "contains data on the location of the crossing, amount and type of highway and train traffic, traffic control devices, and other physical elements of the crossing."¹⁰

To establish priorities for grade crossing improvement projects, States apply the regulatory criteria set forth in 23 C.F.R. Part 924 to the information compiled in the DOT/AAR inventory. In particular, each State must maintain processes for: (i) collecting and maintaining a record of accident, traffic and highway data, including the characteristics of both highway and train traffic; (ii) analyzing data to determine crossing hazard levels based on accident experience or accident potential; (iii) con-

half of which must be used to install signals and other protective devices. 23 U.S.C. § 130(a) & (e). Technically, railroads are liable to the United States for the value of any benefit received as a result of a federally funded grade crossing improvement project involving track they own. 23 U.S.C. § 130(b), (c). The Secretary has determined, however, that installations of crossing traffic control devices are "of no ascertainable net benefit to the railroads and there shall be no required railroad share of the costs." 23 C.F.R. § 646.210 (b)(1). Thus, the entire cost of rail crossing improvements is borne by the federal and state governments.

⁹ FEDERAL HIGHWAY ADMINISTRATION, U.S. DEP'T OF TRANSPORTATION, RAILROAD-HIGHWAY GRADE CROSSING HANDBOOK 52 (2d ed. 1986) ("DOT GRADE CROSSING HANDBOOK").

¹⁰ *Id.*

ducting engineering studies of hazardous locations; and (iv) establishing priorities for implementing safety improvement projects. 23 C.F.R. § 924.9.¹¹

Based upon this information and the availability of funds, state and local jurisdictions choose which grade crossings most need improvement, and, depending on the nature and degree of risk at a particular crossing, decide among various options for improving safety at the crossing. Options range from passive warnings such as "cross-buck" signs to automatic gates activated by train detection systems. See generally DOT RAIL-HIGHWAY CROSSINGS STUDY, *supra*, at 4-4, 4-6.

To assist in this decisionmaking, the Department of Transportation developed the DOT Rail-Highway Crossing Resource Allocation Procedure. See FEDERAL RAILROAD ADMINISTRATION & FEDERAL HIGHWAY ADMINISTRATION, U.S. DEP'T OF TRANSPORTATION, RAIL-HIGHWAY CROSSING RESOURCE ALLOCATION PROCEDURE USER'S GUIDE (3d ed. 1987) ("DOT RESOURCE ALLOCATION PROCEDURE"). The DOT Procedure "recommends crossing safety improvements that yield the greatest accident reduction benefits based on consideration of predicted accidents and casualties at crossings, the cost and effectiveness of warning device options, and the budget limit." *Id.* at 1.

2. Uniform Federal Standards.

Congress has also directed the Secretary to promulgate uniform federal standards governing highway and

¹¹ See generally FEDERAL HIGHWAY ADMINISTRATION, U.S. DEP'T OF TRANSPORTATION, RAIL-HIGHWAY CROSSINGS STUDY 3-3 (1989) ("DOT RAIL-HIGHWAY CROSSINGS STUDY"). See also DOT GRADE CROSSING HANDBOOK, *supra*, at 63 ("A systematic method for identifying crossings that have the most need for safety and/or operational improvements is essential in order to comply with requirements of the Federal Highway Program manual (FHPM), which specifies that each State should maintain a priority schedule of crossing improvements.").

railway safety. 23 U.S.C. § 402(a); see also, 23 U.S.C. § 109(d). The Secretary has accordingly promulgated uniform standards for the form and placement of traffic control devices installed at railroad-highway grade crossings. Those standards are set forth in the FEDERAL HIGHWAY ADMINISTRATION, U.S. DEP'T OF TRANSPORTATION, MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES (1988) ("MUTCD"). Any traffic control device installed at a federally funded grade crossing project must comply with MUTCD's requirements for design, placement, operation, maintenance, and uniformity. 23 C.F.R. §§ 646.214(b), 655.603.

The requirements of the MUTCD are expressly incorporated into the federal regulations controlling grade crossing improvements. See 23 C.F.R. § 646.200(b). Section 8D-1 of MUTCD specifically states that "[t]he selection of traffic control devices at a grade crossing is determined by public agencies having jurisdictional responsibility."¹²

As DOT has recognized in MUTCD:

Due to the large number of significant variables which must be considered there is no single standard system of active traffic control devices universally applicable for grade crossings. Based on an engineering and traffic investigation, a determination is made whether any active traffic control system is required at a crossing and, if so, what type is appropriate. Before a new or modified grade crossing traffic control system is installed, approval is required from the appropriate agency within a given State.

MUTCD § 8D-1.

Furthermore, DOT has promulgated regulations containing specific requirements for the installation of traf-

¹² See also MUTCD § 8A-1 ("The determination of need and selection of devices at a grade crossing is made by the public agency with jurisdictional authority.").

fic control devices at certain crossings. In 23 C.F.R. § 646.214(b)(3)(i), the Secretary has required "the installation of . . . automatic gates" under certain conditions, including "a combination of high speeds and moderately high volumes of highway and railroad traffic, . . . substantial numbers of school buses, . . . trucks carrying hazardous materials," or when "a diagnostic team recommends them." 23 C.F.R. § 646.214(b)(3)(i)(D), (E), & (F).

By promulgating the DOT Highway Safety Program, the MUTCD, and specific regulations governing grade crossing traffic control devices, DOT has plainly covered the subject and thus pre-empted state laws relating to traffic control devices at grade crossings. At bottom, the federal regulatory regime promulgated by DOT to address grade crossing safety has replaced the *ad hoc* fault-based system of private tort law with a rational systemic approach involving a statewide assessment of hazards. This approach recognizes that some crossings are more hazardous than others, and that limited available resources should be directed first to improving the former. This approach requires public authorities to engage in long term planning to reduce safety risks, and relies on expert engineering evaluations of the need for additional warning devices, rather than basing safety decisions on the reactions of railroads to subjective, uncoordinated, *ad hoc* jury determinations of fault.¹³

¹³ The Court of Appeals below held that Section 434 pre-empts state laws only when federal regulations that "cover the subject" are expressly promulgated pursuant to the Secretary's authority under FRSA. Because the court believed that the regulations concerning safety devices at grade crossings were promulgated pursuant to other statutory authority, the court concluded that Section 434 did not apply.

This analysis is wrong for two reasons. First, the regulations at issue were promulgated pursuant to the Secretary's FRSA authority. The Secretary of Transportation has delegated FRSA authority over grade crossings to the *Federal Highway Administration*, which

B. State Tort Claims Premised on Allegedly Inadequate Traffic Control Devices Frustrate the Federal Regulatory Program.

The present federal regulatory structure rests on a fundamental public choice: grade crossing safety is a *public* responsibility that should be paid for by public funds and administered by public agencies. That policy choice leaves no room for state negligence claims premised on a railroad's alleged failure to install an appropriate grade crossing traffic control device. Indeed, permitting such claims would effectively resurrect a regulatory policy that Congress decisively rejected in favor of the present approach.

Federal and state regulatory authorities long ago rejected the idea that a tort-based duty of care to install traffic control devices at grade crossings would protect public safety adequately. Although States followed such an approach during much of the Nineteenth Century, *see* DOT RAIL-HIGHWAY CROSSINGS STUDY, *supra*, at 1-6, rapid expansion of automobile traffic forced public authorities to assume increasing responsibility for grade crossing safety. Initially, this policy shift took the form of shared public responsibility for the cost of crossing

in turn promulgated the regulations now before the Court. 49 C.F.R. § 1.48(o); 23 C.F.R. Parts 646, 655, 924, and 1204.

Second, by its terms, Section 434 does not pre-empt state law only when the Secretary of Transportation adopts a rule pursuant to the authority conferred by FRSA. Rather, pre-emption attaches whenever the Secretary adopts a rule, regulation, order or standard "covering the subject matter" of a state law. The immediately preceding statutory language in Section 433 directs the Secretary to address grade crossing safety pursuant to the authority conferred by FRSA *and* pursuant to the Secretary's "authority over highway, traffic, and motor vehicle safety, and highway construction." 45 U.S.C. § 433(b). Thus, Section 434 is triggered when the Secretary adopts regulations covering a subject, regardless of whether the Secretary acts under the FRSA or under highway safety laws. *See CSX Transp., Inc. v. Public Utilities Comm'n of Ohio*, 901 F.2d 497 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 781 (1991).

improvements.¹⁴ The increased public involvement was largely driven by the perception that "[t]he railroad has ceased to be the prime instrument of danger and the main cause of accidents. It is the railroad which now requires protection from dangers incident to motor transportation." *Nashville, C & St. L. Ry. v. Walters*, 294 U.S. 405, 422 (1935).

By 1964, the Interstate Commerce Commission which then exercised jurisdiction over rail safety, concluded that public authorities should assume sole responsibility for grade crossing safety. See *Prevention of Rail-Highway Grade-Crossing Accidents Involving Railway Trains and Motor Vehicles*, 322 I.C.C. 1 (1964) ("ICC Grade-Crossing Report"); see also DOT RAIL-HIGHWAY CROSSINGS STUDY, *supra*, at 1-8. The Commission specifically found that:

¹⁴ By the end of the Nineteenth Century, States had enacted affirmative legislation allocating the cost of crossing improvements between government and the railroads. See *New York and N.E. Ry. v. Town of Bristol*, 151 U.S. 556 (1893) (upholding Connecticut law requiring railroad and public authorities to share cost of crossing improvements).

The National Industrial Recovery Act of 1933, 48 Stat. 195, authorized \$300 million in grants to States for grade crossing improvement. The Hayden-Cartwright Act of 1934, Pub. L. 73-393, made additional funds available for constructing rail-highway grade separations and for installing traffic control devices. Additional federal funds were made available for this purpose by the Emergency Relief Appropriation Act of 1935, 49 Stat. 115, the Federal-Aid Highway Act of 1936, 49 Stat. 1519, the Federal-Aid Highway Act of 1938, 52 Stat. 638, and the Federal Highway Act of 1940, 54 Stat. 867.

The balance between public and private responsibility for grade crossing safety continued to shift over time. The Federal-Aid Highway Act of 1944 (58 Stat. 838), mandated that 90% of the cost of federally funded highway improvements should be paid out of those funds, with railroads contributing only 10% of the cost. Cf. generally *United States v. Chicago, Burlington & Quincy Ry. Co.*, 412 U.S. 401, 414 (1973) (crossing improvements are "constructed primarily for the benefit of the public to improve safety and to expedite highway traffic flow") (quotation omitted).

the major costs of grade separation and protection at rail-highway grade crossings should be borne by the public since the public is the principal recipient of the benefits derived from grade-crossing protection.

... In the past it was the railroad's responsibility for protection of the public at grade crossings. This responsibility has now shifted. Now it is the highway, not the railroad, and the motor vehicle, not the train which creates the hazard and must be primarily responsible for its removal.

ICC Grade-Crossing Report, 322 I.C.C. at 82. See *id.* at 39 ("the construction and maintenance of rail-highway grade-crossing separation structures and automatic protective devices is a public responsibility").

According to the Commission, "by far the main cause [of grade-crossing accidents] is the failure of the motor vehicle operator to exercise due care and caution or to comply with the existing laws or regulations in the operation of his motor vehicle." *Id.* at 63 (emphasis added). See also *id.* at 73 ("[M]ost of the rail-crossing accidents are caused by human failure arising from noncompliance by the drivers The only hope to lessen the number of accidents is a systematic enforcement of existing safety laws and regulations.").¹⁵ The Commission called

¹⁵ The fact that driver error is the key cause of grade-crossing accidents underlies the major nationwide efforts to improve grade-crossing safety—efforts aimed at educating drivers on the proper crossing of rail tracks. In 1957, the National Safety Council launched its nationwide "Signs of Life Program" aimed at improving driver obedience of warning signs and signals. See ICC Grade-Crossing Report, 322 I.C.C. at 12-15. More recently, AAR, in cooperation with Amtrak and others, and with congressional funding, formed the non-profit organization, Operation Lifesaver, Inc., to disseminate educational and technical information about grade-crossing safety across the country. See DOT RAIL-HIGHWAY CROSSINGS STUDY, *supra*, at 1-21. That driver education and safety law enforcement is critical to improving grade crossing safety is highlighted by the fact (as noted in a recent Department of Trans-

for legislation to improve education about and enforcement of traffic safety rules, and to mandate "universal application of [the] latest standards for uniform traffic control and warning signs by responsible highway and traffic authorities." ICC Grade-Crossing Report, 322 I.C.C. at 86-87. Following the I.C.C. report, the Department of Transportation appointed a task force under the Federal Railroad Administrator to study rail safety issues; the unanimous task force report, issued in 1969, recommended "that broad Federal regulatory authority over all areas of railroad safety be enacted."¹⁶

Other contemporaneous government studies reached the identical conclusion. A 1968 report sponsored by the National Academy of Sciences concluded that a tort-based system of liability did not adequately protect public safety. According to the report, "the predictive equation [of grade-crossing factors] should be a better indication of the number of accidents which will occur at a specific location than even that location's history. Too often, highway engineers are pressured into expending funds for 'improvements' based on one or two spectacular accidents." DAVID SCHOPPERT & DAN HOYT, FACTORS INFLUENCING SAFETY AT HIGHWAY-RAIL GRADE CROSSINGS 62 (National Cooperative Highway Research Program Report No. 50, Highway Research Board, National Academy of Sciences, 1968) ("NAT. ACAD. OF SCIENCES STUDY").

The present federal regulatory regime represents the culmination of this policy evolution. Congress and the Department of Transportation have carefully structured the grade crossing improvement system. Public authori-

portation study) that "[m]ore than half of all rail-highway crossing accidents are the result of a motorist driving around lowered gates or proceeding through flashing red lights without stopping." *Id.* at 4-20.

¹⁶ H.R. Rep. No. 91-1194, 91st Cong., 2d Sess. (1970), reprinted in 1970 U.S.C.C.A.N. 4104, 4108.

ties are responsible for analyzing all grade crossings and making the most appropriate determinations as to how to allocate the financial resources available to improve grade crossing safety.¹⁷

Permitting tort suits such as the one at issue here would be antithetical to the carefully crafted regulatory program. As the Tenth Circuit recently recognized in a case involving identical issues:

Continuing resort to common law standards after a state adopts MUTCD disrupts a basic purpose of FRSA as it is implemented by the provision of funding, namely, recognition of priorities. FRSA contemplates that some sites are more dangerous than others and that resources should first be put to use on the more dangerous ones, all in accordance with a rational scheme based on surveys. This is a prospective-looking system. Jury verdicts based on common law standards, which are of a high degree of abstraction and generality, are retrospective-looking and are addressed to only one crossing rather than a system of crossings. The hit-or-miss common law method runs counter to a statutory scheme of planned prioritization.

Hatfield v. Burlington Northern R. Co., 958 F.2d 320, 324 (10th Cir. 1992), petition for cert. filed, 60 U.S.L.W. 3860 (U.S. June 8, 1992) (No. 91-1977).

The "hit-or-miss common law method" rejected by the court in *Hatfield*—and at issue here—can only lead to the allocation of resources to crossings that may not be the most in need of attention. Indeed, that is precisely what a National Academy of Sciences study identified as

¹⁷ The fiscal constraints are substantial. It would cost well over \$8 billion just to upgrade all "passive" grade crossings to active lights and gates, and many times more to eliminate even a substantial percentage of grade crossings in the country. See DOT CROSSING INVENTORY, *supra*, at 51 (over 110,000 crossings with only "passive" warnings such as "crossbuck" signs); DOT RESOURCE ALLOCATION PROCEDURE, *supra*, at 47 (approximate \$84,000 cost, in 1987 dollars, to upgrade single passive crossing to lights and gates).

a primary problem with the common law approach to grade crossing safety. See NAT. ACAD. OF SCIENCES STUDY, *supra*, at 62.¹⁸ It is exactly this "hit-or-miss" approach that Congress rejected in 1973 by mandating the systematic statewide analysis of grade crossing resource allocation. Thus, there can be no doubt that Section 434 pre-empts state tort claims relating to the alleged inadequacy of traffic control devices at grade crossings.¹⁹

Permitting Respondent's claims to go forward would, moreover, be grossly unfair. Under § 8D-1 of the MUTCD, railroads are not free to install traffic control devices at grade crossings—all such devices must be approved and directed by the state authorities. Thus, Respondent in this case is attempting to impose liability on the railroad for a determination over which the railroad has no legal responsibility, and in fact is legally barred from making independently. Imposing liability would be particularly unfair in this case because government officials specifically *blocked* the installation of the very crossing gates that Respondent claims should have been installed.

¹⁸ See page 16 *supra*.

¹⁹ Since implementation of this regulatory approach, grade crossing accidents have become far less frequent. See DOT RAIL-HIGHWAY CROSSINGS STUDY, *supra*, at 1-15 through 1-16 ("total number of accidents, the total number of fatalities, and the total number of injuries at rail-highway crossings have all declined significantly, in spite of a steady increase in highway vehicle-miles traveled"). Between 1920 and 1972, fatalities related to motor vehicle accidents at grade crossings were fairly constant between 1,300 and 1,800 per year, and never dropped below 1,100 per year. DOT GRADE CROSSING HANDBOOK, *supra*, at 5. Since the 1973 Congressional action requiring a systematic statewide assessment of the grade crossing resource allocation equation, fatalities have dropped to in the neighborhood of 500 per year. *Id.* Public authorities, with the complete cooperation of the railroads, are working to further reduce that number.

II. SECTION 434 PRE-EMPTS STATE NEGLIGENCE CLAIMS BASED ON TRAIN SPEED.

A. The Secretary has Directly Regulated Train Speed, and Claims Based on Speed are Thus Pre-empted.

The Secretary of Transportation has promulgated regulations setting maximum train speeds on all track throughout the country. 49 C.F.R. Part 213. The regulations establish six classes of track and set a maximum train speed for each, based on factors such as tolerances for track gage (§ 213.53), track alignment (§ 213.55), track surface (§ 213.63), and the number of cross ties in a defined length of track (§ 213.109).

State tort duties limiting the speed at which a railroad can operate its trains in grade crossing areas plainly have "a connection with or reference to" the subject covered by the regulations contained in Part 213. Indeed, as the courts below correctly concluded, the Georgia law at issue here and the federal regulations in Part 213 cover the identical subject: appropriate train speed. Courts have thus consistently held that local train speed ordinances relate to "covered subjects" within the meaning of Section 434 by virtue of the maximum train speed regulations in Part 213.²⁰

State common-law duties which might otherwise regulate maximum train speed at grade crossings cannot be

²⁰ See, e.g., *CSX Transp., Inc. v. Thorsby, Ala.*, 741 F. Supp. 889, 891 (M.D. Ala. 1990); *City of Covington v. Chesapeake & Ohio Ry. Co.*, 708 F. Supp. 806, 808 (E.D. Ky. 1989); *CSX Transp., Inc. v. City of Tullahoma, Tenn.*, 705 F. Supp. 385 (E.D. Tenn. 1988); *Sisk v. National R.R. Passenger Corp.*, 647 F. Supp. 861 (D. Kan. 1986). These cases also reject the argument that Section 434's savings clause for "local hazards" can preserve municipal train speed ordinances. In making the "local hazards" analysis, these courts reached the antecedent conclusion that local train speed ordinances plainly have a connection with or reference to the subject covered in the federal train speed regulations in Part 213, and thus are pre-empted unless they come within the savings clause.

saved by the argument that they seek objectives different from, and consistent with, federal maximum speed restrictions. As *Morales* squarely holds, an express preemption provision displaces all state law within its defined scope, whether or not the state law conflicts in some way with federal objectives. 112 S. Ct. at 2039. Accord *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 829 (1988); *Metropolitan Life*, 471 U.S. at 739. See also *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605, 612 (1926) (pre-emption analysis turns not on whether federal and state laws are "aimed at distinct and different evils" but whether they "operate on the same subject"); *Burlington Northern Railroad Co. v. State of Montana*, 880 F.2d 1104, 1106 (9th Cir. 1989); *Armijo v. Atchison, Topeka & Santa Fe Ry. Co.*, 754 F. Supp. 1526 (D.N.M. 1990).

B. Pre-emption of Claims Based on Train Speed at Grade Crossings is Consistent With Public Policy Because Train Speed is an Integral Part of the Grade Crossing Safety Resource Allocation Determination.

Respondent's claim that CSXT operated its train at an excessive speed would be pre-empted even if the Secretary had never promulgated maximum train speed regulations in Part 213. That is because issues of train speed and appropriate grade crossing devices are inextricably bound together in the analysis of grade crossing safety made under the federal program. Federal regulation of grade crossing traffic control devices thus protects against risks caused by train speed at crossings, and covers that subject within the meaning of Section 434.

Virtually all grade crossing safety efforts are aimed at vehicular traffic control and driver education—not at reducing train speed to improve crossing safety. See, e.g., DOT GRADE CROSSING HANDBOOK, *supra*, at 89-169.²¹

²¹ See also DOT RAIL-HIGHWAY CROSSINGS STUDY, *supra*, at 2-13 through 2-15.

That is because the reduction of train speed is simply not an appropriate means of improving grade crossing safety. A train's direction is confined to the tracks, and its ability to slow down or stop is highly limited by the tremendous momentum inherent in the movement of objects of great mass. Unlike an automobile, a train cannot take evasive action or quickly stop to avoid a potential accident.²²

In its 1964 report, the Interstate Commerce Commission specifically rejected the possibility that limitations on train speed could significantly improve grade crossing safety. See ICC Grade-Crossing Report, 322 I.C.C. at 75-76. After analyzing the many factors that affect crossing safety, the Commission was unconvinced that "the imposition of . . . restrictions in train speeds would materially aid in reducing the number of rail-highway grade-crossing accidents." *Id.*

The Commission noted that "distances within which trains can be stopped depend on a number of factors including train length, tonnage, speed, grade, type of locomotive, condition of the rails, and whether the train brake application is in service or emergency." ICC Grade-Crossing Report, 322 I.C.C. at 77. The Commission reviewed estimates that "under normal conditions a passenger train consisting of eight cars and three diesel units traveling between 45 and 50 miles per hour would require approximately 2,000 feet within which to stop under emergency application of the train brakes," and that "for a heavy

²² See ICC Grade-Crossing Report, 322 I.C.C. at 77-78 ("As between the engineer and the driver of a motor vehicle, the latter is in a far better position to control the movement of its vehicle than is the engineer of a train because of the difference between the adhesion of the train wheels to the rails and the contact between the motor vehicle wheels and the roadway.") The steel-on-steel contact between train and rails is significantly less conducive to braking or stopping than the rubber-on-asphalt contact between a tire and the road.

tonnage train it would require as much as 2 miles within which a normal stop could be made." *Id.*²³ Thus, for a train to stop prior to reaching a given grade crossing, the train engineer would have to know to apply the brakes a minimum of one minute (or more) before reaching the crossing; at the time a train would need to start braking, an automobile heading for the grade crossing might itself be one half mile or more from the crossing.²⁴

Indeed, studies indicate that low train speeds often *increase* the likelihood of grade crossing accidents. The Department of Transportation has noted that limitations

²³ See also FEDERAL HIGHWAY ADMINISTRATION, U.S. DEP'T OF TRANSPORTATION, DRIVER BEHAVIOR AT RAIL-HIGHWAY CROSSINGS 3-6 (FHWA Project No. DTFH61-88-Z-00145, March 1989) (noting that an automobile travelling at 55 m.p.h. can stop within 200 feet, while a 100 car train at that speed would require one mile in which to stop); DOT GRADE CROSSING HANDBOOK, *supra*, at 44 ("An estimate is that a typical 100 car freight train traveling 60 mph would require over one mile to stop in emergency braking.").

Mathematically, a train maintaining a 45 m.p.h. speed will take approximately 30 seconds to travel 2,000 feet. Thus, a train *decelerating* from 45 m.p.h. (in the 2,000 foot distance noted by the I.C.C.) will require significantly more than 30 seconds to stop. Similarly, a train travelling at 55 or 60 m.p.h. requiring at least one mile to stop (as noted above) will take *at least* a minute to stop.

The inability of a train to make an emergency stop prior to reaching a grade crossing is even more clear for nighttime train traffic. The federally-mandated requirement that a train headlight be able to illuminate 800 feet ahead of the train, 49 C.F.R. § 229.125, is less than *half* of the 2,000 foot distance required by the hypothetical passenger train to stop. Thus, by the time a train engineer is close enough to see a vehicle in a grade crossing, the train is too close to stop prior to the crossing.

²⁴ Even if a train engineer were somehow able to predict a grade crossing emergency, the use of emergency braking risks even more catastrophic results than the crossing accident itself. As the Department of Transportation has noted, a "train in an emergency braking situation is subject to derailing, as well as injury to passengers, and damage to lading, wheels, and brake systems." DOT RAIL-HIGHWAY CROSSINGS STUDY, *supra*, at 5-10.

on speed "directly reduce[] the level of service for highway traffic and may also affect safety." See DOT GRADE CROSSING HANDBOOK, *supra*, at 41. According to DOT, "[b]ecause of the longer period of time during which the crossing is closed to highway traffic, a motorist may take risks by passing over the crossing just ahead of the train. In many cases, risks such as these are not successful and collisions result." *Id.* See also DOT RAIL-HIGHWAY CROSSINGS STUDY, *supra*, at 5-4 through 5-5 (noting that motorists drive around lowered crossing gates—and attempt to cross in front of a train—because of "inconvenience" and "delay").²⁵ A high percentage of grade crossing accidents occur at low train speeds. In 1990, almost 23% of all grade crossing accidents involving motor vehicles occurred with trains travelling at 9 m.p.h. or less, and in almost 60% of all such accidents the trains were travelling less than 30 m.p.h.²⁶ DOT has specifically noted that to "enhance safety and operations" at crossings "[t]rain speeds might be *increased* by upgrading the track class." DOT GRADE CROSSING HANDBOOK, *supra*, at 142 (emphasis added). See also NAT. ACAD. OF SCIENCES STUDY, *supra*, at 9 ("trains moving at higher speeds provide better [visual] cues to the driver at night than do slower-moving trains"). Thus, the notion that "slower is safer" simply does not always hold true at grade crossings. See *Southern Pacific Transp. Co. v. St. Charles Parish Policy Jury*, 569 F. Supp. 1174, 1176-77 (E.D. La. 1983) (detailing risks of imposing low train speed limits).

²⁵ The incentives for motorists to attempt to "beat" a slow moving train are easily understood—a typical one-mile-long freight train would take 12 minutes to clear a grade crossing at 5 m.p.h. (as opposed to 90 seconds at 40 m.p.h.). Moreover, slow trains can significantly reduce the ability of police, fire, and ambulance vehicles to respond to emergencies. See DOT GRADE CROSSING HANDBOOK, *supra*, at 142 ("Increased vehicular delay not only affects operations but may affect safety if emergency vehicles cannot respond to a life-threatening situation.").

²⁶ See DOT CROSSING INVENTORY, *supra*, at 20.

Furthermore, if trains were required to reduce speed sufficiently to create some possibility of stopping prior to crossings, an efficient national rail system would not be possible. Trains would have to approach crossings at such slow speeds that interstate commerce would be seriously impaired. Railroad tracks and public highways intersect at over 175,000 grade crossings in the United States, *see* DOT CROSSING INVENTORY, *supra*, at 45. Trains would encounter, on the average, 2.4 grade crossings per mile of rail line across the country. *See* DOT GRADE CROSSING HANDBOOK, *supra*, at 3. Such speed reductions would also substantially increase the cost of rail transportation by increasing fuel costs and causing extensive scheduling delays, which would impair railroads in their ability to compete with other modes of transportation. *See Southern Pacific Transp. Co.*, 569 F. Supp. at 1177-78 (detailing costs of train speed limits).

For precisely these reasons, no modern approach to improving grade crossing safety even suggests reductions in train speed as a regulatory measure. DOT's comprehensive survey of possible options for improving grade crossing safety does not even mention reduction of train speed. *See* DOT RAIL-HIGHWAY CROSSINGS STUDY, *supra*, at 2-13. This point is particularly clear in DOT's discussion of crossing issues posed by high-speed trains:

Variation in warning time at crossings equipped with active traffic control devices may occur with high speed passenger trains. Because of the wide variation in train speeds (passenger trains versus freight trains), train detection circuitry should be designed to provide the appropriate advance warning for all trains.

High speed passenger trains present additional problems at crossings with only passive traffic control devices. Safe sight distance along the track from a stopped position must be much greater for a faster train. The sight distance along the track from the

highway approach must also be greater unless vehicle speed is reduced.

DOT GRADE CROSSING HANDBOOK, *supra*, at 217.²⁷ As DOT's analysis makes clear, a variety of options are available for improving safety at crossings used by high speed trains—including more careful calibration of warning devices, increasing sight distances, and reducing motorist speed. But, for the reasons identified *supra*, the one thing DOT's analysis does not contemplate is reducing train speed.

That limitations on train speed are an inappropriate method to improve grade crossing safety does *not* mean that train speed is irrelevant to the grade crossing safety equation. To the contrary, train speed is an important element of the federally-mandated grade crossing assessment and resource allocation process. The DOT/AAR Crossing inventory form—which provides the underlying data for state policy choices respecting the installation of grade crossing traffic control devices—specifically requires information about “speed of train at crossing” and “typical speed range over crossing.” DOT GRADE CROSSING HANDBOOK, *supra*, at 53.

Many of the hazard indices used by States to measure safety risks at grade crossings specifically incorporate train speed. For example, the U.S. DOT Accident Prediction Equation specifically factors in speed. DOT GRADE CROSSING HANDBOOK, *supra*, at 70. Many of the most widely used state-created indices do the same. *See* DOT RAIL-HIGHWAY CROSSINGS STUDY, *supra*, at 4-10; DOT GRADE CROSSING HANDBOOK, *supra*, at 63-78.²⁸ As DOT

²⁷ Similarly, the Manual on Uniform Traffic Control Devices expressly varies the requirements for warning signs and other control devices at grade crossings depending on train speed. *See* MUTCD §§ 8B-3, 8B-5, 8C-5, 8C-6.

²⁸ These indices employ sophisticated mathematical models to quantify risks based on a host of relevant variables—such as expected train and motor traffic at a crossing, safety devices presently

has noted, the expected speed at which trains will pass through a grade crossing is an important consideration in determining the type of protection that should be provided at the crossing. See DOT RAIL-HIGHWAY CROSSINGS STUDY, *supra*, at 4-10.

Thus, beyond the direct pre-emption found in the federal regulations controlling maximum track speed, see 49 C.F.R. Part 213, state tort claims based on excessive train speed must be pre-empted for the same reason. Section 434 pre-empts tort claims based on allegedly inadequate crossing safety devices. Train speed is an important element in the grade crossing equation, and as with grade crossing traffic control devices cannot be left to the reactive approach of state tort law.

in place, number and alignment of train tracks, and past accident history.

DOT's own accident prediction formula expressly incorporates train speed. See DOT GRADE CROSSING HANDBOOK at 70. Certain versions of the "New Hampshire" hazard index, which many States use, also expressly incorporates train speed. *Id.* at 66. The Florida Department of Transportation accident prediction model likewise specifically incorporates train speed as a variable. *Id.* at 76.

CONCLUSION

The judgment of the court of appeals with respect to traffic control devices at grade crossings should be reversed, and the judgment with respect to train speed should be affirmed.

Respectfully submitted,

JOHN H. BROADLEY
DONALD B. VERRILLI, JR.*
JOHN B. MORRIS, JR.
JENNER & BLOCK
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

ROBERT W. BLANCHETTE
Vice President-Law and
General Counsel
ASSOCIATION OF AMERICAN RAILROADS
American Railroads Building
50 F Street, N.W.
Washington, D.C. 20001
(202) 639-2505
Counsel for Amicus
* Counsel of Record

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

CSX TRANSPORTATION, INC.,
v. *Petitioner,*

LIZZIE BEATRICE EASTERWOOD,
Respondent.

LIZZIE BEATRICE EASTERWOOD,
v. *Cross-Petitioner,*

CSX TRANSPORTATION, INC.,
Cross-Respondent.

On Writs of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF FOR THE
RAILWAY LABOR EXECUTIVES' ASSOCIATION
AS AMICUS CURIAE
IN SUPPORT OF RESPONDENT

LAWRENCE M. MANN
STEVEN M. WEISBAUM
ALPER & MANN, P.C.
400 N. Capitol Street, N.W.
Suite 851
Washington, D.C. 20001
(202) 298-9191

September 28, 1992

QUESTION PRESENTED

1. Whether federal statutes and regulations relating to the uniformity and financing of grade crossing signals, promulgated pursuant to the Federal Highway Safety Act and Federal-Aid Highway Act, preempt state common-law requirement that railroads maintain safe grade crossings?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	2
SUMMARY OF THE ARGUMENT	2
ARGUMENT	5
I. THE PREEMPTIVE SCOPE OF SECTION 434 OF THE FEDERAL RAILROAD SAFETY ACT DOES NOT EXTEND TO STATE COMMON LAW ACTIONS, AND ITS APPLICATION IS LIMITED TO REGULATIONS ENACTED PURSUANT TO THAT ACT	5
A. 45 U.S.C. § 434 Expressly Preempts State Regulation of Any Subject Matter Regulated by the Secretary	5
B. Federal Courts Have Adopted Differing Interpretations of Both the Scope and the Application of § 434	6
C. Congress Intended, With the Enactment of the Federal Railroad Safety Act, to Create a Partnership Between Federal and State Lawmakers in Furtherance of Rail Safety	10
1. Congress Intended That States Retain Authority to Regulate Railroad Safety	10
D. § 434 Does Not Preempt State Common Law	16
E. State Regulation of Grade Crossings Has Not Been Preempted Pursuant to § 434	19
1. There Is a Long History of federal Non-feasance Regarding the Regulation of Grade Crossing Safety	19
2. The Secretary Has Not Regulated the Subject Matter of Grade Crossings	20
CONCLUSION	22

TABLE OF AUTHORITIES

CASES	Page
<i>California v. ARC America Corp.</i> , 109 S.Ct. 1661 (1989)	18
<i>Chevron U.S.A. Inc. v. Hammond</i> , 726 F.2d 483 (9th Cir. 1984), cert. denied, 105 S.Ct. 1686 (1985)	17
<i>Chrysler Corp. v. Rhodes</i> , 416 F.2d 319 (1st Cir. 1969)	17
<i>Chrysler Corp. v. Tofany</i> , 419 F.2d 499 (2d Cir. 1969)	17
<i>Daouelon v. New Orleans Terminal Co.</i> , 474 F.2d 1108 (5th Cir. 1973), cert. denied, 414 U.S. 855 (1973)	15
<i>Easterwood v. CSX Transportation, Inc.</i> , 933 F.2d 1548 (11th Cir. 1991)	<i>passim</i>
<i>English v. General Electric Co.</i> , 496 U.S. 72, 110 S.Ct. 2270 (1990)	17, 19
<i>Florida Lime & Avocado Growers v. Paul</i> , 373 U.S. 132 (1963)	14, 15
<i>Gade v. National Solid Waste Management Assn.</i> , 112 S.Ct. 2374 (1992)	18, 19
<i>Hillsborough County, Florida v. Auto Med. Labs.</i> , 471 U.S. 707, 105 S.Ct. 2371 (1985)	17
<i>Karl v. Burlington Northern Railroad Co.</i> , 880 F.2d 68 (8th Cir. 1989)	7, 8
<i>Kelly v. Washington</i> , 302 U.S. 1 (1937)	17
<i>Marshall v. Burlington Northern, Inc.</i> , 720 F.2d 1149 (9th Cir. 1983)	6, 7, 9
<i>N.Y.S. Dept. of Social Services v. Dublino</i> , 413 U.S. 405 (1973)	15, 17
<i>Runkle v. Burlington Northern, Inc.</i> , 188 Mont. 286, 613 P.2d 982 (1980)	7
<i>Pacific Gas and Electric v. State Energy Resources Conservation and Development Commission</i> , 461 U.S. 190 (1983)	17
<i>Schwartz v. Texas</i> , 344 U.S. 199 (1952)	17
STATUTES AND REGULATIONS	
23 U.S.C. § 130	<i>passim</i>
23 U.S.C. § 203	9
23 U.S.C. §§ 401-404	6

TABLE OF AUTHORITIES—Continued

	Page
45 U.S.C. § 431 (q)	2, 6, 21
45 U.S.C. § 433	<i>passim</i>
45 U.S.C. § 434	<i>passim</i>
23 C.F.R. § 655.601 (1981)	<i>passim</i>
49 C.F.R. Part 234	21
56 Fed. Reg. 33722 (1991)	21
Federal-Aid Highway Act of 1973, Pub. L. No. 93-87, 87 Stat. 280	3, 8
Federal Highway Act, ch. 241, 39 Stat. 535	3
Federal Railroad Safety Act of 1970, Pub. L. No. 91-548, 45 U.S.C. § 421 et seq.	<i>passim</i>
Highway Safety Act of 1966, Pub. L. No. 89-564, 80 Stat. 731 (1966)	6
Rail Safety Improvement Act of 1988, Pub. L. No. 100-342, 102 Stat. 624	21
OTHER MATERIALS	
116 Cong. Rec. 27613	13
NTSB, Rail-Highway Crossing Incident and Inventory Bulletin, No. 11, Calendar Year 1988 (June 1989)	2
Haralson & Levine, <i>Grade Crossings and Train Speed: Preemption Trial</i> , Feb. 1991	16
Hearings on H.R. 16980 Before the House Committee on Interstate and Foreign Commerce, 90th Cong. 2d Sess. 1-6 Serial No. 90-39 (1968)	11
Hearings Before the Subcomm. on Transp. and Aeronautics of the Comm. on Interstate and Foreign Commerce on H.R. 7068, H.R. 11417, and H.R. 14478, S. 1933, 91st Cong., 2d Sess., Ser. No. 91-51, p. 29 (1970)	11, 12, 13
House Report No. 91-114, U.S. Code Cong. and Admin. News, 91st Cong., (1970) p. 4116	14
H.R. Rep. No. 91-1194, 91st Cong., 1st Sess. p. 19 (1970)	13
S. Rep. No. 91-619, 91st Cong., 1st Sess. 8-9 (1969)	13, 14

IN THE
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OCTOBER TERM, 1991

No. 91-970

CSX TRANSPORTATION, INC.,
v. *Petitioner,*
LIZZIE BEATRICE EASTERWOOD,
Respondent.

No. 91-1206

LIZZIE BEATRICE EASTERWOOD,
v. *Cross-Petitioner,*
CSX TRANSPORTATION, INC.,
Cross-Respondent.

On Writs of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

**BRIEF FOR THE
RAILWAY LABOR EXECUTIVES' ASSOCIATION
AS AMICUS CURIAE
IN SUPPORT OF RESPONDENT**

This brief is submitted by the Railway Labor Executives' Association on behalf of the respondent/cross-petitioner, Lizzie Beatrice Easterwood.

STATEMENT OF THE CASE

Thomas Easterwood, the husband of cross-petitioner Lizzie Beatrice Easterwood, was killed at a grade crossing on February 24, 1988 when the truck that he was driving was struck by a locomotive operated by CSX Transportation, Inc. Mr. Easterwood was one of 652 grade crossing fatalities in 1988. In that year alone there were 6,025 grade crossing accidents resulting in 3,069 casualties. NTSB *Rail-Highway Crossing Incident and Inventory Bulletin*, No. 11, Calendar Year 1988, (June 1989). The hazards associated with grade crossings are nationwide in scope, with crossing accidents totaling 5,350 in 1991. Grade crossing accidents have historically been, and continue to be the single largest cause of railroad related deaths in this country.

SUMMARY OF THE ARGUMENT

Despite the foregoing, the federal government has failed to enact any meaningful regulations addressing the national hazard created by grade crossings. The federal government's inaction was most recently addressed on September 3, 1992, with the signing into law of 45 U.S.C. § 431(q), P.L. 102-365, directing that the Secretary of Transportation (hereinafter "Secretary") "shall . . . issue such rules regulations orders and standards to ensure the safe maintenance, inspection and testing of signal systems and devices at railroad highway grade crossings." Federal Railroad Safety Act of 1970, Pub. L. 91-548 (codified as amended, 45 U.S.C. § 431(q), P.L. 102-365) (hereinafter "FRSA"). This most recent amendment removed the language "as may be necessary" taking from the Secretary any discretion with respect to the promulgation of said regulations, thus compelling the Secretary to take action to address the grade crossing problem.

Despite the Secretary's inaction in relation to the safety aspects of the grade crossing problem, the Secretary has

promulgated regulations for the distribution of federal funds to states, pursuant to his authority under the Federal-Aid Highway Act of 1973, Pub. L. No. 93-87, 87 Stat. 280 (codified as amended at 23 U.S.C. § 130), and the Federal Highway Act, ch. 241, 39 Stat. 535. The Secretary's limited response to the grade crossing problem was accurately explained by the Eleventh Circuit in *Easterwood v CSX Transportation, Inc.*, 933 F.2d 1548, 1555 (11th Cir. 1991). The Court noted that

While the legislative history of the Federal Railroad Safety Act evinces a strong concern about the hundreds of annual deaths in grade crossing accidents, neither the Act nor the regulations specifically address the problem through federal regulation of the signals and the design of grade crossings. The Act requires the Secretary . . . only to study problems with existing grade crossings and to create grade crossing demonstration projects. Moreover, the Secretary . . . has not promulgated any regulations regarding grade crossings under his general power to regulate railroad safety.

Regarding the petitioner's claims that 23 U.S.C. § 130 preempts state common law, the Eleventh Circuit noted that the regulations in question merely require the states to survey all of the grade crossings and to formulate a schedule of possible projects. 933 F.2d at 1555. Once the states have done so, the states would be able to use federal funds to bring said devices into compliance with the standards set forth in the Manual on Uniform Traffic Control Devices for Streets and Highways (23 C.F.R. § 655.601 (1981), hereinafter "MUTCD").

Under the guise of promoting national uniformity of safety regulations, railroads such as petitioners herein, have argued that regulations promulgated under 23 U.S.C. § 130 trigger the express preemption clause, 45 U.S.C. § 434, of the FRSA. Further, the railroads have sought to apply preemption not only to preclude state

statutory claims, but to preclude state common law claims as well. The broad reading of the FRSA's preemptive scope proposed herein by the petitioner flies in the face of justice and common sense. The petitioner is seeking to prevent the individual states from protecting their citizens from a hazard which has gone virtually unchecked by federal regulatory authorities. By petitioner's reasoning, the mere availability of federal funds for the purpose of upgrading existing crossings would preempt state common law and hold harmless all railroads regardless of their degree of negligence in conducting operations. In light of the already obvious hazard posed by grade crossings, the petitioner's attempt to cut free of the last vestiges of accountability for the hazards posed by their operation is impermissible.

The history of the FRSA reveals congressional intent to limit the preemptive scope of the federal legislation, particularly in situations where state law was in place to fill regulatory gaps. State common law has traditionally served just such a purpose. The railroads are attempting in the nation's courtrooms, to broaden the field of federal laws which would preempt state law claims, and further are attempting to broaden the field of state law actions which would be preempted, in violation of both the letter and the intent of the FRSA.

ARGUMENT

I. THE PREEMPTIVE SCOPE OF SECTION 434 OF THE FEDERAL RAILROAD SAFETY ACT DOES NOT EXTEND TO STATE COMMON LAW ACTIONS, AND ITS APPLICATION IS LIMITED TO REGULATIONS ENACTED PURSUANT TO THAT ACT

A. 45 U.S.C. § 434 Expressly Preempts State Regulation of Any Subject Matter Regulated by the Secretary

Section 434 of the FRSA governs the preemptive scope of federal regulations over state regulations, with respect to matters of railroad safety. According to § 434:

The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

Pursuant to § 434, where the federal government has regulated a particular "subject matter," states are preempted from enacting their own regulations with regard to that same subject matter. Section 433(b) of the FRSA expressly directed the Secretary to study the grade crossing problem and recommend solutions thereto.

[T]he Secretary shall, insofar as practicable, *under the authority provided by this subchapter* and pursuant to his authority over highway, traffic, and

motor vehicle safety, and highway construction, undertake a coordinated effort toward the objective of developing and implementing solutions to the grade crossing problem, as well as measures to protect pedestrians in densely populated areas along railroad rights-of-way.

(emphasis added). Despite this directive the Secretary took no affirmative action to address the grade crossing problem for over twenty years. The recent amendment of the FRSA, *supra* at 1, states in no uncertain terms that the Secretary shall take action, as directed over twenty years earlier. 45 U.S.C. § 431(q), P.L. 102-365.

B. Federal Courts Have Adopted Differing Interpretations of Both the Scope and the Application of § 434

In the case of *Marshall v. Burlington, Northern, Inc.*, 720 F.2d 1149, 19954 (9th Cir. 1983), the United States Court of Appeals for the Ninth Circuit interpreted § 434 of the FRSA, concluding that the Secretary had delegated authority to regulate grade crossings to local agencies pursuant to the Highway Safety Act of 1966, Pub. L. No. 89-564, 80 Stat. 731 (1966) (as amended, codified at 23 U.S.C. §§ 401-404 (1982)). The Highway Safety Act directs the Secretary to develop uniform safety programs, thereby making states eligible to receive federal financial assistance. Furthermore, the *Marshall* court reasoned that, because the MUTCD prescribes that the selection of devices, and the decision to use federal funds for upgrading those crossings are made by local agencies with jurisdiction over the crossing, the Secretary has thereby delegated federal authority to regulate grade crossings to local agencies. 720 F.2d at 1154. The court reasoned that any application of the MUTCD by state authorities was tantamount to federal action and as such, preempted application of state common law to grade crossings. The Court reached this conclusion despite the fact that the MUTCD was ac-

tually adopted by the Federal Highway Administration under provisions of the Federal-Aid Highway Act and Federal Highway Safety Act, and was meant to provide a means by which states could obtain federal funds, part of which were earmarked to eliminate grade crossing hazards. Although the *Marshall* court ultimately concluded that state common law was not preempted in that case, the court indicated that once a federal decision is reached through the local agency regarding the adequacy of the warning devices at the crossing, the railroad's duty under state common law would be preempted. *Id.*

The Eighth Circuit addressed a state common law claim alleging negligent failure to provide adequate warning devices in *Karl v. Burlington, Northern Railroad Co.*, 880 F.2d 68 (8th Cir. 1989). The railroad, again relying on the fact that the Secretary had delegated authority to state agencies to regulate crossings pursuant to the MUTCD, argued that the local authorities had approved the device in question, thus relieving the railroad of its duty, and preempting common law negligence claims. The railroad contended, as it had in *Marshall*, that since federal law grants to the Secretary the power to regulate grade crossings, and since the local agency had approved the warning device, the approval should preempt claims based on common law negligence. 880 F.2d at 76.

The *Karl* court explicitly recognized the railroad's claim of preemption as one based on 45 U.S.C. §§ 433, 434. *Id.*¹ Citing *Runkle v. Burlington Northern*, 188 Mont. 286, 299-300, 613 P.2d 982, 990-91 (1980), the *Karl*

¹ Contrary to the suggestion of petitioner, the 8th Circuit was clearly interpreting the preemptive scope of § 434, as indicated in the footnote at the outset of its discussion of the preemption issue. The court noted that "Burlington Northern specifically argues that the Federal Highway Safety Act, 23 U.S.C. § 402 (1982), and the Federal Railroad Safety Act, 45 U.S.C. §§ 433, 434 (1982), preempt Karl's common law negligence claims." 880 F.2d at 76, n.7.

court held that although the Federal-Aid Highway Act of 1973 represented an effort by the federal government to improve the safety of grade crossings, *it did not lessen the duty of a railroad to maintain a good and safe crossing.* *Id.* (emphasis added).

The case from which the petitions were sought herein involved two claims of negligence against CSX Transportation, petitioner herein. The respondent, plaintiff therein, brought suit contending that the railroad was negligent in failing to install automatic gates and warning devices at the crossing and for exceeding a reasonable speed. *Easterwood v. CSX Transportation, Inc.*, 933 F.2d 1548 (11th Cir. 1991).

Addressing the plaintiff's claim regarding the adequacy of the crossing warnings, the Court found that "[T]he Secretary has not promulgated any regulations regarding grade crossings under his general power to regulate railroad safety." The Court then addressed the CSX claim that the Federal-Aid Highways Act preempts all state law. The Court noted that "as opposed to the Federal Railroad Safety Act . . . [§ 130(d) of the Federal-Aid Highways] contains no explicit provision preempting contrary or similar law." 933 F.2d at 1555. The Court also noted that the regulations relied on by the petitioners were not so pervasive as to invoke preemption by implication. *Id.* Finally, the Court added that "since the allegedly pre-empted field includes the preemption of state tort law, an area of traditional state interest, the court would have to find a clear and manifest congressional intent in order to imply preemption." *Id.*, n.4.

The Court concluded that

because the state has neither upgraded the grade crossing nor affirmatively decided that existing crossing was adequate, we have no occasion to decide whether a federally sponsored upgrade would insulate the railroad from [common law] liability. We do hold that, in the absence of a decision by a federally

designated policymaker, state common-law liabilities are not affected by the federal highway aid provisions.

Id. at 1556. Although the lower court failed to address whether a federally sponsored upgrade would insulate the railroad from common law liability, the Court did note that in light of the preceding analysis, it had reservations about the holding in *Marshall* which imputed secretarial action to a state agency's consideration of a crossing for the receipt of federal funds. *Id.* at 1555, n.5.

The reading of § 434 supported by petitioner herein is in absolute conflict with the FRSA's primary goal of railroad safety, and is not a rational application of the term "until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement." The petitioner's reading of § 434 would allow the federal government to preempt state law whenever states consider the use of federal funds earmarked for some "subject matter." As in the present case, the federal agency need not even control the spending of said funds. The implausible result is that the States would forevermore preempt their own common law cause of action as to those crossings, merely by *considering* whether to use federal funds for grade crossing improvements. To view the state's consideration as tantamount to the Secretary's adoption of a rule, regulation, order, or standard covering the subject matter of such state requirement, and conclude State common law is thereby preempted is inconsistent with any reasonable interpretation of either the letter or the intent of the FRSA.²

² The scope of § 203 of the Federal Highway Act is limited to the federal financing of grade crossings. Furthermore, the safety implications are so attenuated as to make them virtually ineffective to that end. The New York Times reported in a recent article that the State of Texas alone has, as of the printing of the article, 13,582 grade crossings. According to the article, it would take 120 years

C. Congress Intended, With the Enactment of The Federal Railway Safety Act, to Create a Partnership Between Federal and State Lawmakers in Furtherance of Rail Safety

Although § 434 of the FRSA begins with a general statement of intent to promote nationally uniform laws and standards relating to railroad safety "to the extent practicable," the section goes on, in a more specific way, to direct that states shall retain the power to regulate areas of rail safety "[U]ntil such time as the Secretary has adopted a rule, regulation, order or standard covering the subject matter of such State requirement." 45 U.S.C. § 434. The language of § 434 could not be more clear regarding its intent to allow continued state involvement in the regulation of railroad safety. Indeed, the drafters' desire for national uniformity of safety laws was limited with the words "to the extent practicable," removing any doubt that the primary purpose of the FRSA was railroad safety. To read § 434's general goal of uniformity to the extent practicable, as the determining factor when deciding whether subject matter has been covered by a federal regulation, undermines the FRSA's primary goal of safety, and amounts to an usurpation of the FRSA's specific goal of railroad safety by its general desire for uniformity.

1. Congress Intended That States Have Authority To Regulate Railroad Safety

The language of the FRSA and its legislative history make it clear that Congress did not intend § 434 to operate as a bar to continued state regulation of railroad safety absent specific federal regulatory authority.³ The FRSA provides, *inter alia* that the Secretary of Transportation shall have jurisdiction over all areas of railroad

for the state of Texas alone to address the grade crossing problem within the scope of § 203.

³ See *Napier v. Atlantic Coast Line R.R. Co.*, 272 U.S. 605 (1926).

safety. Along with the broad authority delegated to the Secretary, Congress specifically authorized state regulation of railroad safety.

The genesis of the FRSA was in 1968 with the introduction of H.R. 16980, a bill drafted by the Secretary of Transportation. (*See Hearings on H.R. 16980 Before the House Committee on Interstate and Foreign Committee*, 90th Cong. 2d Sess. 1-6, Serial No. 90-39 (1968)). Section 4 of that bill would have eliminated all state laws after two years, with the exception of four separate areas. No further action was taken by Congress in the 90th Congress.

On April 18, 1969, the Secretary of Transportation created a Task Force on railroad safety comprised of representatives from the Federal Railroad Administration, the state regulatory commissions, the railroads, and the railroad unions. The Report of the Task Force was submitted to the Secretary on June 30, 1969. On the preemption issue the Report provided that "Existing State rail safety statutes and regulations remain in full force until and unless preempted by Federal regulation." Subsequent to the Report the interested parties together attempted to draft a proposed bill for Congressional consideration in the 91st Congress. Regarding preemption, the bill drafted by the Federal Railroad Administration was not acceptable to either labor or the state commissions. Even in the section-by-section analysis of the Administration's bill by the Secretary, which was introduced as S. 3061 and H.R. 14417, the Secretary recognized that the states would not be preempted "... unless the Secretary prescribed federal safety standards covering the subject matter of the *particular* state or local safety requirements. . . ." (emphasis added).

The preemptive language of S. 3061 and H.R. 14417 as introduced provided:

SEC. 5. State or local laws, rules, regulations, or standards relating to railroad safety in effect on the date of enactment of this Act, shall remain in effect unless the Secretary shall have prescribed rules, regulations or standards covering the subject matter of the State or local laws, regulations or standards.

Section 5 above was revised and incorporated into the compromise legislation reported by both Senate and House Committees, and ultimately passed by Congress in S. 1933. In testifying on the proposed bills, then Secretary of Transportation Volpe discussed S. 1933 as passed by the Senate and pointed out the areas of permissible state jurisdiction over railroad safety. The relevant portion of the testimony states:

To avoid a lapse in regulation, Federal or State, after a Federal safety bill has been passed, section 105 provides that the states may adopt or continue in force any law, rule, regulation, or standard relating to railroad safety until the Secretary has promulgated a specific rule, regulation or standard covering the subject matter of the state requirement. This prevents the mere enactment of a broad authorizing Federal statute from preempting the field and making void the specific rules and regulations of the states. Therefore, until the Secretary has promulgated his own specific rules and regulations in these areas, state requirements will remain in effect. This would be so whether such state requirements were in effect on or after the date of enactment of the Federal statute. . . .

Hearings Before the Subcomm. on Transp. and Aeronautics of the Comm. on Interstate and Foreign Commerce on H.R. 7068, H.R. 11417, and H.R. 14478 (and similar bills), S. 1933, 91st Cong., 2d Sess., Ser. No. 91-51, p. 29 (1970) (emphasis added).⁴ Rep. Jake Pickle testified as follows:

⁴ Section 105 of the Senate bill S. 1933, as reported, and section 205 of the House bill, as reported, are incorporated into 45 U.S.C. § 434.

Contrary to some speculation that this version of the Railroad Safety Act cuts across State jurisdictions, *the States can still take action* in three methods. First, the State can continue and initiate legislation in areas of safety not covered by Federal regulations. . . . As an important adjunct, for the first time, *the States are clearly given the power to initiate legislation in areas which have not been touched by these [federal] regulations* and these State legislative efforts will remain in effect unless and until such time that the Federal Government institutes its own regulations. *This is an important advance and recognition of State governments.*

116 Cong. Rec. 27613 (August 6, 1970) (emphasis added).

The Senate Report provided further support for the authority of the state to regulate railroad safety:

. . . this section [105] preserves from Federal preemption two types of State power. First, the States may continue to regulate with respect to that subject matter which is not covered by rules, regulations, or standards issued by the Secretary. All State requirements will remain in effect until preempted by federal action concerning the same subject matter.

S. Rep. No. 91-619, 91st Cong., 1st Sess. 8-9 (emphasis added).

The House Report stated:

Section 205 of the bill declares that it is the policy of Congress that rail safety regulations be nationally uniform to the extent practicable. It provides, however, that until the Secretary acts with respect to a particular subject matter, a State may continue to regulate in that area. Once the Secretary has prescribed a uniform national standard the State would no longer have authority to establish Statewide standards with respect to rail safety.

H.R. Rep. No. 91-1194, 91st Cong., 1st Sess. p. 19 (1970) (emphasis added).

While it is true that Congress wanted national uniformity in rail safety to the extent practicable, the explicit authorization of state regulation in 45 U.S.C. § 434 was a countervailing concern to its desire for national uniformity. See House Report No. 91-114, U.S. Code Cong. and Admin. News, 91st Cong (1970) p. 4116 (hereinafter "House Report"): "[Section 205] provides, however, that until the Secretary acts with respect to a particular matter, a State may continue to regulate in that area." As stated in Senate Report,

the committee recognizes the State concern for railroad safety in some areas. Accordingly, this section preserves from Federal preemption two types of State power. First, the States may continue to regulate with respect to that subject matter which is not covered by rules, regulations, or standards issued by the Secretary. All State requirements will remain in effect until preempted by federal action concerning the same subject matter.

S. Rep. No. 91-619, 91st Cong., 1st Sess. 8-9 (1969). Regarding issues of rail safety, Congress has "unmistakably ordained" that states can regulate rail safety. See *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963).

As Congress has explicitly stated, the FRSA as adopted "prevents the mere enactment of a broad authorizing Federal statute from preempting the field and making void the specific rules and regulations of the state." *Supra* at 12. It cannot be said, therefore, that the adoption of federal regulations which merely address a subject matter circuitously, as in the case of the Federal-Aid Highway and Federal Highway Safety Act, are intended to preempt state railroad safety regulations, much less to preempt state common law protection. Only where FRA has enacted a regulation covering the same subject matter as the state regulation are both the clear manifestation of congressional preemptive intent and the

irreconcilable conflict between a state and federal regulation present which require preemption of the state regulation. 45 U.S.C. § 434; *N.Y.S. Dept. of Social Services v. Dublino*, 413 U.S. 405 (1973); *Florida Lime & Avocado Growers, supra*.

In addition to retaining the right to regulate subject matters on which the Secretary has not promulgated a rule, regulation, order or standard, states maintain authority to regulate within their borders, pursuant to a "local hazard" exception. Pursuant to § 434, states may regulate

(2) Where the Secretary has promulgated a rule, regulation, order or standard covering the same subject matter or the State requirement and the regulation is:

- a) necessary to eliminate or reduce an essentially local safety hazard, and
- b) is not incompatible with any federal provision, and
- c) when not creating an undue burden in interstate commerce.

See, *Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108, 1112 (5th Cir. 1973), *cert. denied*, 414 U.S. 855 (1973).

The foregoing establishes that pursuant to § 434, state regulations will not be preempted when state regulation is necessary to reduce an essentially "local safety hazard," so long as said state regulation is not incompatible with any Federal law and does not place undue burden on interstate commerce. Although the FRSA recognizes that a state may continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety to eliminate or reduce an essentially local hazard, some courts which have addressed the issue have failed to recognize that state common law may im-

pose such a greater standard. The common law of each state requires that railroads exercise reasonable care in warning of the approach of their trains. Haralson & Levine, *Grade Crossings and Train Speed: Preemption, Trial*, Feb. 1991, at 26. Even under the most stringent application of the FRSA's express preemption clause, the states can regulate because grade crossings pose unique local hazards. "The sheer number of possible factors renders nationally uniform safety standards for grade crossings impractical." *Id.* at 21.

The historical police powers of the states have always been jealously-guarded against unwarranted intrusion by federal law particularly where, as here, the federal regulation provides no private right of action. Unlike common law, the FRSA was promulgated to promote rail safety, and provides no private right of action for individuals injured as a result of railroad negligence. Further, there is nothing in the FRSA to suggest that the regulations promulgated thereby establish anything other than minimum standards.

The current trend by railroads to seek total preemption, not only of state statutory law, but of state common law as well, is among the most invasive and egregious of violations to the sovereignty of the states and their efforts to protect their citizens.

D. § 434 Does Not Preempt State Common Law

This Court has repeatedly refused to void state statutes or regulations, absent congressional intent to preempt them.

If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation to do so. The exercise of federal supremacy is not lightly to be presumed.

New York State Dep't of Social Services v. Dublino, 413 U.S. 405 (1973), quoting *Schwartz v. Texas*, 344 U.S. 199, 202-203 (1952). See also, *Pacific Gas and Electric v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190, 206 (1983). The Court is especially reluctant to strike down state regulations when it would leave citizens unprotected while waiting for federal action. See *Hillsborough County, Florida v. Auto Med. Labs*, 471 U.S. 707, 105 S. Ct. 2371, 2376 (1985); *Kelly v. Washington*, 302 U.S. 1, 14-15 (1937). Any doubts as to whether federal regulation of a particular subject matter is the same as state regulation should be resolved in favor of the states. *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 487-488 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 1686 (1985). Where, as here, a state's police power is involved, federal preemption is not to be presumed. *Chrysler Corp. v. Tofany*, 419 F.2d 499, 511 (2d Cir. 1969); *Chrysler Corp. v. Rhodes*, 416 F.2d 319, 324 n.8 (1st Cir. 1969).

This court has discussed the scope of federal preemption as it relates to state common law actions in two recent cases. In *English v. General Electric Co.*, 496 U.S. 72, 110 S. Ct. 2270 (1990), the Court addressed whether a petitioner's state-law tort claim for intentional infliction of emotional distress was preempted by particular sections of the Energy Reorganization Act or the Atomic Energy Acts which provided specific guidelines for whistleblower protection, including specific remedies. The question presented was whether the failure of federal remedial statutes to allow for recovery of punitive damages by whistleblowers would bar such recovery under a state common law claim. 496 U.S. at 89. The Court noted that where a field which Congress is said to have preempted includes areas that have been traditionally occupied by states, congressional intent to supersede state laws must be clear and manifest. *Id.* at 79. This holding is equally appropriate when determining whether the Secretary has expressly regulated subject matter preempting

state law pursuant to § 434. The regulations relied on by petitioner simply do not amount to clear and manifest intent to supersede state common law. Preemption of state common law is inappropriate in the present case.

This Court, concluding that the state common law claim allowing for punitive damages was not preempted, reiterated its teaching that “[o]rdinarily, state causes of action are not preempted solely because they impose liability over and above that authorized by federal law.” *Id.*, citing *California v. ARC America Corp.*, 490 U.S. 93, 104, 109 S. Ct. 1661 (1989). This Court recognized in that case that not every state law that in some remote way may affect the decisions of those who build and run nuclear facilities can be said to fall within the preempted field. Similarly, as indicated in the proceedings below, “Allowing tort suits to go forward against railroad companies simply does not affect (or at best only tangentially affects) the provision of federal aid to the states to help them build better railroad grade crossings.” *Easterwood*, 933 F.2d at 1555.

In *Gade v. National Solid Waste Management Ass’n*, — U.S. —, 112 S. Ct. 2374 (1992), this Court reiterated the fact that preemption analysis cannot ignore the effect of challenged state action on the preempted field whatever the purpose or purposes of state law, and stated that “the key question is thus at what point the state regulation sufficiently interferes with federal regulation that it should be deemed pre-empted. . . . *Id.* at 2387. Regarding grade crossings, the regulations enacted pursuant to the Federal-Aid Highway and the Federal Highway Safety Act are *de minimis* and clearly not tailored to address the hazards associated with grade crossings. These regulations merely provide funds and comprise minimal guidelines within which state crossing apparati must fit to qualify for the use of said funds. The petitioner’s suggestion that a common law statute

holding the carrier to reasonable standards of care with respect to the maintenance of these crossings in any way contravenes said federal regulations is without merit.

Citing *English, supra*, this Court noted that a state tort law claim was not preempted by a federal regulation where it did not have a direct and substantial effect on the federal scheme in issue. This Court added that state laws of general applicability that do not conflict with the federal regulatory scheme and that are generally applicable to all individuals, are not generally preempted. *Id.* at 2387-88. Although the Court noted that a state law cannot be saved merely because the state can express some statewide application, the state law is not preempted if it does not directly, substantially, and specifically regulate the federally regulated subject matter.

State tort claims at issue are precisely the type of generally applicable laws identified by this Court in *Gade*, and in no way directly, substantially regulate where the Secretary has allegedly regulated.

E. State Regulation of Grade Crossings Has Not Been Preempted Pursuant to § 431

1. The Secretary Has Not Regulated the Subject Matter of Grade Crossings

As previously indicated the federal highway regulations which petitioner seeks to rely on as preempting the subject matter of grade crossings are limited to the identification and prioritization of grade crossings and to the funding of upgrades with respect to the most hazardous crossings. 23 U.S.C. § 130. The forgoing funding scheme for grade crossing improvements is a far cry from the type of federal regulation which might preempt state administrative law on the subject much less state common law. It cannot be said that the subject matter of grade crossings have received any federal regulation whatsoever.

2. *There Is a Long History of Federal Nonfeasance Regarding the Safety Regulation of Grade Crossings*

As correctly stated in the respondent cross-petitioners Response to Petition for Certiorari, the legislative history reveals that Congress' concern with railroad crossing safety has been limited to the study of the grade crossing problem and providing federal funds therefor. Respondent cross-petitioner's Response to Petition at 5-7. A closer look indicates that the Secretary has failed to take any significant action even in regard to the studying and funding directed by Congress.⁵

Enacting the Federal Railroad Safety Act of 1970, Congress directed the Secretary of Transportation to "submit to the President . . ., within one year after October 16, 1970, a comprehensive study of the problem of eliminating and protecting railroad grade crossings, . . . together with his recommendations for appropriate action including, if relevant, a recommendation for equitable allocation of the economic costs of any program proposed as a result of such study." 45 U.S.C. § 433. Despite this congressional directive in the original language of the FRSA, the Federal Railroad Administration failed to address adequately key issues associated with grade crossing hazards, including train visibility and grade crossing warning systems.⁶ After 18 years of FRA inac-

⁵ In fact, the action which allegedly invokes § 434 herein is not taken directly by the Secretary but is taken by state officials and attributed to the Secretary based on a far-reaching notion of delegated authority.

⁶ One such example of FRA inaction involved FRA consideration of the need for visibility lights on trains or at crossings. In 1983 the FRA concluded a rulemaking action regarding the need for locomotives to be equipped with lights to alert motorists to approaching trains. Despite record evidence which indicated that lights would be cost beneficial, the FRA concluded, based on a report issued by the Association of American Railroads (hereinafter "AAR"), that "there is no evidence in the available data that alerting lights are

tion, Congress acted again in section 23 of the Rail Safety Improvement Act of 1988 (Pub. L. 100-342), directing that "The Secretary shall, within one year after the date of enactment of the Rail Safety Improvement Act of 1988, issue such rules, regulations, orders, and standards as may be necessary to ensure the safe maintenance, inspection, and testing of signal systems at railroad highway grade crossings." 45 U.S.C. § 431(q). Despite the explicit congressional directive that the Secretary promulgate regulations and despite the incontrovertible evidence of the hazards associated with grade crossings, the FRA, in keeping with its history of inaction, "determined that a need exists for more accurate factual information in order to determine the extent of Federal involvement in establishing requirements for periodic maintenance, inspection, and testing of active crossing warning systems." Grade Crossing Signal System Safety, 49 CFR Part 234, 56 Fed. Reg. 33722 (1991). The FRA's Final Rule, issued more than two years after the deadline set by Congress, amounted to no more than an exercise in information gathering imposed on the railroads. Further, the rule applied only to *active* crossing signal systems, whereas nearly two-thirds of the nation's 176,572 rail-highway intersections have passive warning systems such as crossbucks; passive warning systems have no lights or bells to warn of oncoming trains, and no gates.

effective in reducing grade crossing accidents." 48 Fed. Reg. 20257. The FRA, relying on the AAR report, noted that "As in the case with any complex statistical analysis, reasonable minds might differ with certain of the assumptions that were made by the AAR in comparing and analyzing data . . .," and further concluded that "[E]ven assuming that alerting lights were effective to some degree, that alone would not warrant Federal regulation to require them as opposed to other alternatives." *Id.* The rulemaking was terminated by the FRA and no further action was taken.

Interestingly, the Administrator of the FRA at that time, Robert W. Blanchette, is currently the Vice-President and General Counsel for the AAR, whose report provided the basis for terminating the FRA rulemaking regarding safety lights.

To date, the FRA has taken no action to regulate the requirement of standards regarding maintenance, inspection, and testing of active crossing warning systems. The FRA is still collecting, in their words, "more accurate factual information in order to determine the extent of Federal involvement in establishing requirements for periodic maintenance, inspection, and testing of active warning systems." Now, a full four years after initially directing the FRA to take action to establish said requirements, Congress has once again demanded action. The passage of Pub. L. 102-365, took away the Secretary's discretion regarding the issuance of rules regulations orders and standards to ensure the safe maintenance, inspection and testing of signal system and devices at railroad highway grade crossings. The Secretary's history of inaction in the matter of grade crossing safety, and Congress' recent responses thereto, are a clear testament to the fact that the Secretary has not yet regulated grade crossings as anticipated by the Federal Railroad Safety Act from which the petitioners seek to invoke preemptive power. To suggest, as the petitioner has, that there are any federal regulations addressing the safety aspects of the grade crossing problem is simply without merit.

CONCLUSION

For the foregoing reasons the judgment in 91-790 should be affirmed.

Respectfully submitted,

LAWRENCE M. MANN
STEVEN M. WEISBAUM
ALPER & MANN, P.C.
400 N. Capitol Street, N.W.
Suite 851
Washington, D.C. 20001
(202) 298-9191

September 28, 1992

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether federal statutes and regulations relating to railroad-highway grade crossings preempt a state law cause of action against a railroad based on the alleged breach of the railroad's duty to provide adequate safety devices at grade crossings.¹

¹ This brief does not address the other question presented by this case, namely: Whether federal regulations setting speed limits for trains on all classes of track nationwide preempt a state law cause of action against a railroad for operating its trains at unreasonable speeds.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMERICAN AUTOMOBILE ASSOCIATION	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	3
CONCLUSION	9

TABLE OF AUTHORITIES

Cases:	Page
<i>California v. ARC America Corp.</i> , 490 U.S. 93 (1989)	3
<i>Cincinnati, New Orleans, & Texas Pacific Ry. v. Bohon</i> , 200 U.S. 221 (1906)	3
<i>Cipollone v. Liggett Group, Inc.</i> , 112 S. Ct. 2608 (1992)	7
<i>English v. General Electric Co.</i> , 496 U.S. 72 (1990)	3
<i>Gibbons v. Ogden</i> , 22 U.S. (9 Wheat) 1 (1824)	3
<i>Ingersoll-Rand Co. v. McClendon</i> , 111 S. Ct. 478 (1990)	7
<i>Malone v. White Motor Corp.</i> , 435 U.S. 497 (1978)	7
<i>Retail Clerks Intl. Ass'n v. Schermerhorn</i> , 375 U.S. 96 (1963)	7
Constitutional Provisions:	
U.S. Const. art. VI, cl. 2	3
Statutes:	
Federal Railroad Safety Act of 1970, Pub. L. No. 91-458, 84 Stat. 971	2,4,5,7,8,9
Highway Safety Act of 1973, Pub. L. No. 93-87, 87 Stat. 282	2,4,5
23 U.S.C.A. §130	5,6
45 U.S.C.A. §421	7
45 U.S.C.A. §431	4
45 U.S.C.A. §434	5

Table of Authorities-Continued

	Page
Regulations:	
Manual on Uniform Traffic Control Devices (adopted in 23 C.F.R. §655.603(a))	2,4,6,7
23 C.F.R. §646.214	6
23 C.F.R. §§655.601-655.603	6
49 C.F.R. §§200-240	5
Reports:	
H.R. Rep. No. 1194, 91st Cong., 2d Sess., <i>reprinted</i> in 1970 U.S. Code Cong. & Admin. News 4104	8
Fed. Highway Admin., <i>Rail-Highway Crossings</i> <i>Study</i> (1989)	8
Fed. R.R. Admin., <i>Rail-Highway Crossing Accident/ Incident and Inventory Bulletin No. 13</i>	8

INTEREST OF THE AMERICAN AUTOMOBILE
ASSOCIATION

The American Automobile Association ("AAA"), a not-for-profit corporation, represents more than 33 million motorists in the United States and Canada.² Eighteen percent of the U.S. driving population are AAA members, and 21 percent of all cars registered in the U.S. belong to AAA members. These members are served by a network of more than 1,000 AAA offices, which provide travel, insurance, financial, and automobile services. AAA is also one of the largest travel information publishers in the world, producing more than 350 million copies of travel-related publications annually.

Since its founding in 1902, AAA has been a leading advocate for motorist and pedestrian safety. The AAA-sponsored School Safety Patrol—children protecting their classmates from traffic dangers—was established in 1920 and has become a nationwide movement of a half million volunteers. AAA was among the first to introduce traffic safety education into elementary and junior high schools. AAA also pioneered driver education in high schools, driver testing, and training of driver education teachers. During the 1930's, AAA became involved in improvement of pedestrian safety and inaugurated its annual Pedestrian Safety Inventory—a program recognizing cities and states for outstanding pedestrian safety records.

AAA has a strong interest in this case because of the impact the Court's decision will have on traffic

² AAA has obtained written consent from both parties to file this brief. Copies of the letters of consent have been filed with the Clerk pursuant to United States Supreme Court Rule 37.

safety. Railroad-highway grade crossings present a substantial danger to AAA's members, and to the motoring public generally. The outcome of this case could determine whether railroads have any responsibility to ensure that grade crossings are safe.

SUMMARY OF THE ARGUMENT

The Federal Railroad Safety Act of 1970 authorized the Secretary of Transportation to make rules and regulations for all areas of railroad safety. However, Congress explicitly permitted states to adopt or continue in force any law relating to railroad safety until the Secretary has adopted a rule or regulation covering the subject matter of the state law.

The Secretary has not adopted rules or regulations requiring *any* safety devices at grade crossings that have not been improved with federal funds. None of the regulations issued under the Railroad Safety Act relates to grade crossings. The Secretary has promulgated regulations concerning grade crossings under the Highway Safety Act of 1973. However, those regulations pertain *only* to grade crossings involved in federally-funded highway projects. The regulations do not cover crossings that, like the one in this case, have not been improved with the use of federal funds. The Secretary has also incorporated into the Code of Federal Regulations the Manual on Uniform Traffic Control Devices. The Manual provides standards for the design of grade crossing safety devices, but does not mandate the use of safety devices at particular crossings.

Preservation of state law tort actions against railroads is consistent with Congress' purpose in enacting the Railroad Safety Act, which was "to promote

safety in all areas of railroad operations and to reduce railroad-related accidents." Preemption of state laws would immunize railroads from potential tort liability and would thus diminish the incentive of railroads to maintain adequate warning devices. Indeed, because no federal statute or regulation requires safety devices at crossings that are not a part of federally-funded projects, preemption of state laws would permit railroads to leave such crossings completely unprotected.

ARGUMENT

I. STATE LAWS REGULATING MATTERS OF TRADITIONAL STATE CONCERN ARE PRESUMED VALID ABSENT A CLEAR AND MANIFEST INTENTION OF CONGRESS TO PREEMPT THEM

Under the Supremacy Clause of the Constitution, art. VI, cl. 2, state laws that "interfere with, or are contrary to the laws of congress, made in pursuance of the constitution," are invalid. *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 211 (1824). The question presented in this case is whether federal law preempts a state law cause of action against a railroad for alleged negligence in failing to provide adequate safety devices at grade crossings. The provision of remedies for acts of negligence is traditionally a matter of state concern. See, e.g., *Cincinnati, New Orleans, & Texas Pacific Ry. v. Bohon*, 200 U.S. 221, 226 (1906). A presumption exists against finding preemption of state law in areas traditionally regulated by the states. *California v. ARC America Corp.*, 490 U.S. 93, 101 (1989). In such situations, congressional intent to supersede state law must be "clear and manifest." *English v. General Electric Co.*, 496 U.S. 72, 79 (1990). In this case, accordingly, state law must be

presumed valid, unless it is shown that preemption is consistent with the clear and manifest intent of Congress.

II. FEDERAL LAW HAS NOT PREEMPTED STATE LAWS REQUIRING RAILROADS TO PROVIDE ADEQUATE SAFETY DEVICES AT GRADE CROSSINGS THAT HAVE NOT BEEN IMPROVED WITH FEDERAL FUNDS

The Petitioner/Cross-Respondent, CSX Transportation, Inc., cites three sources of federal law which, in its view, preempt state law: (1) the Federal Railroad Safety Act of 1970; (2) regulations implementing the Highway Safety Act of 1973; and (3) the federal Manual on Uniform Traffic Control Devices. Contrary to CSX's view, none of these laws explicitly or implicitly preempts state laws of the type involved in this case. In fact, none of these federal laws purports to address the subject matter of the pertinent state law—the requirement to provide safety devices at a grade crossing that has not been improved with federal funds.

A. The Federal Railroad Safety Act Expressly Preserves State Laws Until They Are Displaced by Federal Regulations Covering the Same Subject Matter

The Federal Railroad Safety Act of 1970, Pub. L. No. 91-458, 84 Stat. 971, authorized the Secretary of Transportation ("Secretary") to promulgate rules, regulations, and standards for all areas of railroad safety, "supplementing provisions of law and regulations in effect on the date of enactment [October 16, 1970]." 45 U.S.C.A. §431(a) (1992). Section 205 of the Act expressly permits states to "adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State

requirement." 45 U.S.C.A. §434 (1992). Thus, Congress explicitly chose *not* to preempt state railroad safety laws until the Secretary adopted a rule "covering" the same "requirement."

The determinative question in this case is whether the Secretary has adopted regulations covering the requirement to provide adequate safety devices at grade crossings that, like the one here, have not been improved with federal funds. The answer is no. The Secretary has not used the rulemaking authority granted by the Railroad Safety Act to promulgate *any* regulations regarding grade crossings. See 49 C.F.R. §§200-240 (1992). It is clear, therefore, that the Railroad Safety Act has not resulted in the preemption of *any* state law.

B. Regulations Implementing the Highway Safety Act Are Inapplicable to Grade Crossings That Have Not Been Improved with Federal Funds

The Secretary has adopted certain regulations relating to grade crossings in connection with federally-funded highway projects. Those regulations were issued under the authority of the Highway Safety Act of 1973. Pub. L. No. 93-87, 87 Stat. 282. The Highway Safety Act established a safety program for grade crossings. See 23 U.S.C.A. §130 (1992). That program provides states with federal funds "for the elimination of hazards of railway-highway crossings." 23 U.S.C.A. §130(a) (1992). In order to participate in the program, states are required to "conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose." 23 U.S.C.A. §130(d) (1992). The states are then eligible

to use federal highway funds to aid the improvements. 23 U.S.C.A. §130(a) (1992).

The regulations which the Secretary has issued pursuant to the Highway Safety Act govern the selection of warning devices at grade crossings that are improved with the use of federal funds. 23 C.F.R. §646.214(b) (1992). For projects involving federal money, the Secretary requires installation of "automatic gates with flashing light signals" whenever specified conditions exist at the crossing, such as multiple main line tracks. 23 C.F.R. §646.214(b)(3)(i) (1992). These regulations are inapplicable to grade crossings that, like the one in this case, have not been improved with federal funds. The regulations do not "cover," and therefore do not preempt, state laws respecting grade crossings that do not involve federal funds.

C. The Manual on Uniform Traffic Control Devices Does Not Require the Use of Safety Devices at Grade Crossings

In 1974, the Secretary incorporated into the Code of Federal Regulations the Manual on Uniform Traffic Control Devices ("MUTCD"). See 23 C.F.R. §§655.601-655.603 (1992). The MUTCD established national standards for highway traffic signals and warning devices. *Id.* In 1977 the MUTCD was amended to include standards for traffic control devices at railroad grade crossings. MUTCD §1A-4.

The MUTCD merely provides standards for the "design and application" of traffic control devices. *Id.* It does not provide any rules or guidelines as to which safety devices are to be used at particular crossings. The MUTCD states only that "[t]he decision to use a particular device at a particular location should be

made on the basis of an engineering study of the location." *Id.*

The MUTCD is not relevant here. This case concerns the duty to select and install adequate safety devices at grade crossings. The MUTCD does not require the use of *any* safety devices; it merely prescribes the form of the devices when they are used. Therefore, the MUTCD does not preempt state laws imposing a duty of care upon railroads in selecting the safety devices to be used at grade crossings.

III. PRESERVATION OF STATE LAW TORT ACTIONS AGAINST RAILROADS IS CONSISTENT WITH CONGRESS' PURPOSE OF PROMOTING RAIL SAFETY

This Court recently restated the proposition that "the purpose of Congress is the ultimate touchstone of preemption analysis." *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2617 (1992); see also *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978); *Retail Clerks Intl. Ass'n v. Schermerhorn*, 375 U.S. 96, 103 (1963). Discerning Congress' intent requires examination of the explicit statutory language and the structure and purpose of the statute. *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478, 482 (1990).

Both the terms and the legislative history of the Railroad Safety Act demonstrate that the overriding concern of Congress was to improve railroad safety. In Section 101 of the Act, Congress declared that its purpose was "to promote safety in all areas of railroad operations and to reduce railroad-related accidents." 45 U.S.C.A. §421 (1992).

The legislative history reveals that Congress was particularly concerned with the rising number of deaths at railroad crossings. The report of the Inter-

state and Foreign Commerce Committee of the House of Representatives states:

The committee is aware that grade crossing accidents constitute one of the major causes of fatalities connected with rail operations. The need to do something about these terrible accidents which have one of the highest incidents of death and serious injury per accident, necessitates an immediate attack on the grade crossing problem as soon as possible.

H.R. Rep. No. 1194, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Admin. News 4104, 4116.

Twenty-two years after enactment of the Railroad Safety Act, railroad grade crossings remain dangerous places. According to statistics compiled by the Federal Railroad Administration, in 1990 there were 5,713 accidents at grade crossings in the United States, resulting in 698 deaths and 2,407 injuries. Fed. R.R. Admin., *Rail-Highway Crossing Accident/Incident and Inventory* Bulletin No. 13, at 2 (1991). One of the best predictors of train-vehicle accidents at grade crossings is the type of warning devices installed. See Fed. Highway Admin., *Rail-Highway Crossings Study*, at 2 (1989). Despite the importance of warning devices, 67 percent of the 176,572 public grade crossings in the United States are not equipped with active warning devices (gates, flashing lights, bells, or highway signals). See Fed. R.R. Admin., *Rail-Highway Crossing Accident/Incident and Inventory* Bulletin No. 13, at 59 (1991).

Preemption of state law tort actions against railroads would impair, rather than promote, efforts to

improve safety at grade crossings. Railroads, because of their expertise and familiarity with local conditions, are in the best position to identify and correct safety problems at grade crossings. Immunizing railroads from potential tort liability would undermine highway safety by diminishing their incentive to maintain adequate warning devices. Indeed, because no federal statute or regulation requires safety devices at crossings that are not a part of federally-funded projects, preemption of state laws would permit railroads to leave such crossings completely unprotected. This would turn Congress' purpose in enacting the Railroad Safety Act on its head. Since congressional purpose is the "touchstone" of preemption analysis, preemption is clearly inappropriate in this case.

CONCLUSION

This Court should affirm the court of appeals' holding that federal law does not preempt a railroad's state law duty to provide adequate warning devices at a grade crossing that has not been improved with federal funds.

Respectfully submitted,

PAUL R. VERKUIL, ESQUIRE
Counsel of Record

President
AMERICAN AUTOMOBILE ASSOCIATION
1000 AAA Drive
Heathrow, Florida 32746
407-444-7111
Counsel for Amicus Curiae

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1992

CSX TRANSPORTATION, INC.,
Petitioner,
v.

LIZZIE BEATRICE EASTERWOOD
Respondent.

LIZZIE BEATRICE EASTERWOOD,
Cross-Petitioner,
v.

CSX TRANSPORTATION, INC.
Cross-Respondent.

On Writs of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF FOR
AMERICAN TRUCKING ASSOCIATIONS, INC.,
THE NATIONAL PRIVATE TRUCK COUNCIL, INC.,
AND THE AMERICAN BUS ASSOCIATION, INC.
AS AMICI CURIAE IN SUPPORT OF
RESPONDENT/CROSS PETITIONER

RICHARD A. ALLEN
ZUCKERT, SCOTT & ROSENBERGER
888 Seventeenth Street, N.W.
Washington, D.C. 20006-3959
(202) 298-8660
*Attorney for National Private
Truck Council, Inc.*

CHARLES A. WEBB
5127 N. 27th Road
Arlington, VA 22207
(703) 528-2266
*Attorney for American Bus
Association, Inc.*

DANIEL R. BARNEY
ROBERT S. DIGGES, JR.
Counsel of Record
ATA LITIGATION CENTER
2200 Mill Road
Alexandria, VA 22314-4677
(703) 838-1865

PROF. DAVID A. STRAUSS
1111 East 60th Street
Chicago, IL 60637
(312) 702-9601

*Attorneys for American
Trucking Associations, Inc.*

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICI CURIAE	2
SUMMARY OF ARGUMENT	3
ARGUMENT	6
I. PUBLICLY FUNDED GRADE CROSSING IMPROVEMENT PROJECTS MUST BE COMPLEMENTED BY RAILROAD TORT RESPONSIBILITY TO ENSURE AN ADEQUATE LEVEL OF GRADE CROSSING SAFETY	6
A. Federal Grant Programs Alone Are Not Enough To Produce An Adequate Level Of Safety At The Nation's Grade Crossings....	6
1. The Vast Majority of Grade Crossings Have No Warning Devices Or Only Rudimentary Ones	6
2. Federal Funds, While Substantial, Are Not Sufficient To Address The Problem Of Grade Crossing Safety	7
B. In the Past, Publicly Financed Programs And Railroad Expenditures Spurred By Reasonable Care Duties Have Worked Cooperatively To Improve Grade Crossing Safety	9
C. Elimination of Railroads' Tort Responsibilities Will Eliminate Their Incentive To Independently Make Safety Improvements At Grade Crossings	11
II. GRADE CROSSING SAFETY, NOT NATIONAL UNIFORMITY, HAS BEEN CONGRESS' GOAL IN ENACTING GRADE CROSSING SAFETY PROGRAMS	15

TABLE OF CONTENTS—Continued

	Page
A. Highway Users Benefit From And Support Uniform Federal Standards Which Enhance Highway Safety	16
B. No Federal Regulation Creates—Or Could Possibly Create—Uniformity In The Determinations Of What Type Of Warning Device, If Any, Is Needed At Particular Grade Crossings	17
III. PREEMPTION OF THE RAILROADS' RESPONSIBILITY TO OPERATE AT A SAFE SPEED (GIVEN ALL RELEVANT CIRCUMSTANCES) WILL DIMINISH HIGHWAY SAFETY	21
A. Federal Speed Regulations Are Designed To Reduce The Risk Of Train Derailments	21
B. Tort Responsibility Requires Railroads To Operate At Safe Speeds Under All Applicable Circumstances	22
C. The Arguments Against Holding Railroads To Ordinary Care Standards In Controlling Train Speed Ignore Relevant Aspects Of The Grade Crossing Safety Problem	22
CONCLUSION	24

TABLE OF AUTHORITIES

Cases:	Page
<i>Atlantic Coast R.R. v. Grimes</i> , 109 S.E. 2d 890 (Ga. Ct. App.) (1959)	22
<i>Continental Improvement Co. v. Stead</i> , 95 U.S. 1 (1877)	9
<i>Hatfield v. Burlington N. R.R.</i> , 958 F.2d 320 (10th Cir. 1992)	13
<i>Karl v. Burlington Northern R. Co.</i> , 880 F.2d 68 (8th Cir. 1989)	20
<i>Missouri Pacific Railroad v. Omaha</i> , 235 U.S. 121 (1914)	10
<i>Nashville, C & St. L Ry. v. Walters</i> , 294 U.S. 405 (1935)	10
<i>Sisk v. National R.R. Passenger Corp.</i> , 647 F. Supp. 861 (D. Kan. 1986)	21
Statutes and Regulations:	
Federal-Aid Road Act of 1916, 39 Stat. 355	8
Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, 105 Stat. 1914	8
15 U.S.C. § 1392(d)	16
23 U.S.C. § 130	8, 12
45 U.S.C. § 421	15
45 U.S.C. § 434	15, 19
49 U.S.C. § 1804(a) (4)	16
23 C.F.R. § 130(p)	12
23 C.F.R. § 646.210	14
23 C.F.R. § 646.214(b)	12, 18
23 C.F.R. § 656.603	17
23 C.F.R. § 924.7	12
23 C.F.R. § 924.9(a)	12
49 C.F.R. § 107.202	16
49 C.F.R. § 213	21
49 C.F.R. Part 571	16
49 Fed. Reg. 20,336 (1971)	21
Miscellaneous:	
H.R. Rep. No. 1194, 91st Cong., 2d Sess. (1970)	20
Report of the Secretary of Transportation to Congress, <i>Rail-Highway Crossing Study</i> (1989)	passim

TABLE OF AUTHORITIES—Continued

	Page
<i>Restatement (Second) of Torts</i> (1965)	20
U.S. Dep't of Transportation, <i>The 1991 Annual Report on Highway Safety Improvement Programs</i> (1991)	6, 8, 15
U.S. Dep't of Transportation, <i>Manual on Uniform Traffic Control Devices</i> (1988)	16, 17, 18
U.S. Dep't of Transportation, <i>Rail-Highway Crossing Accident and Inventory Bulletin, No. 13, Calendar Year 1990</i> (1990)	3, 6, 7, 9
U.S. Dep't of Transportation, <i>Railroad Highway Safety Part I: A Comprehensive Statement of the Problem</i> (1971)	6, 8, 10, 14, 17
U.S. Dep't of Transportation, <i>Railroad Highway Safety Part II: Recommendations for Resolving the Problem</i> (1972)	7, 10, 11, 14

IN THE
Supreme Court of the United States

OCTOBER TERM, 1992

Nos. 91-790 and 91-1206

CSX TRANSPORTATION, INC.,
 v. *Petitioner,*

LIZZIE BEATRICE EASTERWOOD
Respondent.

LIZZIE BEATRICE EASTERWOOD,
 v. *Cross-Petitioner,*

CSX TRANSPORTATION, INC.
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On Writs of Certiorari to the
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BRIEF FOR
 AMERICAN TRUCKING ASSOCIATIONS, INC.,
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 AND THE AMERICAN BUS ASSOCIATION, INC.
 AS AMICI CURIAE IN SUPPORT OF
 RESPONDENT/CROSS PETITIONER

Pursuant to Rule 37 of the Rules of this Court, American Trucking Associations, Inc., the National Private Truck Council, Inc., and the American Bus Association,

Inc. respectfully submit this brief as *amici curiae* in support of respondent cross-petitioner.¹

INTEREST OF THE AMICI CURIAE

This case presents the question whether federal regulations preempt state tort claims arising out of collisions at railroad highway grade crossings. The amici are the nation's leading organizations representing highway users that operate large vehicles. It is those highway users whose lives and property are in danger thousands of times a day at the nation's rail/highway grade crossings. Accordingly, the amici have a direct and substantial interest on behalf of their members in the safety of grade crossings. In addition, the amici are able to offer to the Court a practical perspective on the dramatic reduction in safety that would, in our view, result from a ruling in favor of federal preemption in this case.

American Trucking Associations, Inc. ("ATA") is a trade association of motor carriers, state trucking associations, and national trucking conferences created to promote and protect the interests of the national trucking industry. ATA represents over 30,000 for-hire motor carriers, as well as private carriers, leasing companies, and trucking suppliers. ATA's members operate an estimated 500,000 trucks on the nation's highways. Those trucks because of their size and limited acceleration capacity are especially vulnerable at grade crossings. See Report of the Secretary of Transportation to Congress, *Rail-Highway Crossing Study* 5-11 (1989) ("1989 Report to Congress"). In addition, many of those trucks transport hazardous materials, compounding the severity of potential grade crossing accidents. 1989 Report to Congress 5-15.

Annually, over 30% of the accidents at grade crossings involve trucks (U.S. Department of Transportation, *Rail-*

¹ The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

Highway Crossing Accident and Inventory Bulletin, No. 13, Calendar Year 1990 ("1990 Accident Bulletin") 14 (Table 9)) and those accidents are the worst in terms of dollars per vehicle per accident. 1989 Report to Congress 5-13.

The National Private Truck Council, Inc. ("NPTCA") is a trade association representing approximately 1,400 companies that operate truck fleets in furtherance of their non-transportation primary businesses. They are the in-house transportation arms of manufacturers, retailers, and service companies. Private motor carriers account for over 50% of all commercial tonnage in the United States and operate approximately 80% of all commercial vehicles, estimated to be over one million trucks. Those trucks travel over 48 billion miles annually on the nation's highways. Like commercial trucking vehicles, private carrier trucks are especially vulnerable to grade crossing accidents because of their size and limited acceleration capability. Private carriers also often carry hazardous materials, adding to the severity of their grade crossing accidents.

The American Bus Association, Inc. ("ABA") is the national trade association of the intercity bus industry. The ABA has more than 500 members, who operate more than 20,000 buses and provide more than 90% of the intercity bus transportation in the United States. Because conventional motor coaches have a seating capacity of 43 to 47 passengers, bus companies face tremendous exposure to multiple fatality accidents at grade crossings. Like large trucks, buses accelerate slowly and take longer to navigate grade crossings than cars.

SUMMARY OF ARGUMENT

Unsafe rail highway grade crossings are the most dangerous places on the nation's highways; about 6,000 accidents occur at such crossings each year, causing, on average, more than 650 fatalities annually.

The vast majority of rail highway grade crossings in this country have only the most rudimentary warning systems. In 1990, of the 176,572 public crossings, over 110,000 had no active warning systems (that is, no devices that indicated the approach of a train); nearly 75,000 had no advance warning devices of any kind; and at about 42,500 crossings, the crossbucks did not even meet uniform standards. At the nation's approximately 116,000 private crossings, which are not generally eligible for federal funds, conditions are undoubtedly far worse.

These dangerous conditions persist despite substantial expenditures by both governments and railroads to improve crossing safety. For more than a century, improving crossing safety has been viewed as a responsibility shared by the public and the railroads. Railroads, spurred by reasonable care duties under state tort law, have supplemented publicly financed programs, spending in recent years, on average, over \$27 million each year on independent grade crossing projects.

If the railroads' tort responsibilities are eliminated, their incentive to continue to make independent safety improvements at crossings will also be eliminated, leaving the nation's crossings far less safe than they otherwise would have been. The federal grade crossing safety improvement program is not designed to—and is not able to—compensate for the elimination of the railroads' traditional role. Federal funding, while substantial, has never been sufficient to do the job alone. If railroads are insulated from liability, fewer crossings each year will benefit from safety improvements, which will result in more accidents and more fatalities at those crossings. It could not possibly have been Congress' intent in passing grade crossing safety legislation to create a situation that would so inevitably lead to such an anti-safety result.

The principal justification offered for eliminating the railroads' grade crossing safety responsibilities is a supposed lack of uniformity that would result from enforce-

ing state tort law. Uniformity is, however, simply not a relevant concern in this area. Each grade crossing's characteristics are unique and uniformity as to the appropriate type of warning system needed is impossible. Indeed, the Secretary of Transportation has consistently declined to prescribe uniform criteria for the devices needed at crossings. CSX's approach would lead to the uniform *absence* of safety regulation by *any* jurisdiction. That surely was not what Congress intended when it placed a limited preemption provision in a statute otherwise fundamentally designed to ensure adequate safety regulation of railroads.

Preemption of the railroads' responsibility to operate at safe speeds will also reduce highway safety. The history of the speed regulations reveals that their sole function was to minimize derailments caused by operating speeds inappropriate for the kind of track involved. Other critical factors that define a reasonably safe speed (*e.g.*, weather conditions, population, and traffic density) were not and could not be factored into the federal speed regulations. However, it is just those external factors that are the most important in determining a safe operating speed. It is impausible to suppose that Congress or the Secretary intended to allow railroads to ignore all those conditions and to proceed at speeds that are manifestly unsafe.

The arguments in support of the preemption of the railroad's duty to exercise ordinary care in controlling their trains' speed ring hollow. The argument that grade crossing safety is addressed through warning devices rather than by regulating train speed ignores the fact that the large majority of public crossings (about 110,000 out of 176,572) and nearly all private crossings (116,000) have no active warning systems. In addition, the claim that a train's speed is not relevant to accident avoidance because trains cannot stop quickly or take evasive actions, ignores the fact that the slower a train's speed the more time motorists have to see an approaching train, and to stop, drive off the tracks, or leave the vehicle.

ARGUMENT

I. PUBLICLY FUNDED CROSSING IMPROVEMENT PROJECTS MUST BE COMPLEMENTED BY RAILROAD TORT RESPONSIBILITY TO ENSURE AN ADEQUATE LEVEL OF GRADE CROSSING SAFETY.

A. Federal Grant Programs Alone Are Not Enough To Produce An Adequate Level Of Safety At The Nation's Grade Crossings.

1. *The Vast Majority Of Grade Crossings Have No Warning Devices Or Only Rudimentary Ones.*

Railroad grade crossings are the most dangerous places on America's highways. In the last five years for which data are available, grade crossing accidents and fatalities have been increasing—to an average of nearly 650 people killed each year—from their all-time low in 1985. See 1990 Accident Bulletin 3.² Grade crossing accidents are second only to aviation accidents in severity. The ratio of fatalities per accident is over 40 times greater in grade crossing accidents than in motor vehicle accidents in general. See U.S. Department of Transpor-

² From the advent of the motor vehicle, thousands of accidents and fatalities have occurred at grade crossings every year. As early as 1920, 1,273 people were killed at grade crossings and 3,977 injured in accidents involving motor vehicles. See U.S. Department of Transportation, *Railroad Highway Safety Part I: A Comprehensive Statement of the Problem* 6 (1971) ("1971 Report to Congress"). Those numbers rose at an alarming rate to an all time high in 1928, with 2,165 people killed and 6,218 people injured in motor vehicle accidents at grade crossings. *Id.*

Over the next sixty years, motor vehicle related grade crossing accidents and fatalities steadily decreased due to the combined efforts of federal and state governments and the railroads. *E.g.*, 1,588 deaths in 1940, 1,410 in 1950, 1,261 in 1960. *Id.* By 1985, annual fatalities at grade crossings had fallen to the all time low of 480. See U.S. Department of Transportation, *The 1991 Annual Report on Highway Safety Improvement Programs* II-13 (1991) ("1991 Safety Improvement Report"); 1989 Report to Congress 1-6 (Figure 1-1).

tation, *Railroad Highway Safety Part II: Recommendations for Resolving the Problem* (1972) ("1972 Report to Congress").

The major reason grade crossings are so dangerous is that so many of them lack even rudimentary safety devices. For example, in 1990 there were 176,572 public grade crossings. 1990 Accident Bulletin 45 (Table 3). Of these, fewer than 15% had automatic gates. Only an additional 17% had automatic flashing lights. Thus, the vast majority of public grade crossings—over 110,000—had no active warning devices at all.³ Additionally, at almost 75,000 crossings there was no advance warning device of any type but only a sign at the crossing itself. And at about 42,500 crossings even the crossbucks did not meet uniform standards. *Id.* 63-64 (Tables 48-49).

In addition to the 176,572 public grade crossings, there are also 116,267 private grade crossings, that is, crossings located on private land. While data are not readily available on the devices used at these crossings, there is no evidence that they are even as well protected as public crossings. In fact, private crossings are in all likelihood substantially less well protected because they are not generally eligible for safety improvements paid for with public funds.

2. *Federal Funds, While Substantial, Are Not Sufficient To Address The Problem Of Grade Crossing Safety.*

Federal and state governments have not been unmindful of the hazards posed by grade crossings. The federal

³ 1990 Accident Bulletin 59 (Table 45) ("Active warning devices" are devices that warn motorists that a train is approaching. "Passive warning devices", such as "RxR" markings on the road, or the traditional crossbuck, merely warning of the presence of a crossing and do not change appearance when a train approaches.).

government as early as 1916 authorized states to use federal aid highway funds to make safety improvements at grade crossings. Federal-Aid Road Act of 1916 (39 Stat. 355); 1989 Report to Congress 1-8. Thereafter in succeeding highway bills, Congress continued to authorize the use by a state of a portion of its federal highway funds to make grade crossing improvements. That process has continued with the latest renewal of the federal program in the Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, 105 Stat. 1914.

Over the years, billions of federal tax dollars have been spent on grade crossing improvement projects. The Secretary's 1971 Report to Congress (37-38) notes that from 1934 to 1970, approximately \$3.2 billion was spent on grade crossing improvements, including \$2.65 billion in federal funds. Following passage of the Highway Safety Act of 1973 (Pub. L. No. 93-87, § 230, 23 U.S.C. § 130), which established a safety program aimed directly at the elimination of hazards at grade crossings, another \$2.3 billion was spent to upgrade crossings from 1974 through 1990. 1991 Safety Improvement Report IV-3. Additionally, from 1974 to 1990, an estimated \$2.4 billion in Federal-aid highway funds were devoted to rail-highway crossing related projects. 1989 Report to Congress 1-20.

Those efforts have been effective at reducing grade crossing accidents. At improved crossings, fatal accidents have been reduced by 88% and injuries by 62%. 1991 Safety Improvement Report IV-5.⁴ But it is important to recognize that these limited federal expenditures have improved only a small fraction of the grade crossings that need improvements.

Currently, the U.S. Department of Transportation ("DOT") estimates that approximately 6,000 grade cross-

⁴ The Department of Transportation estimates that 6,400 fatalities and 26,500 nonfatal injuries have been prevented since 1974 as a result of the federal grade crossing improvement program. 1991 Safety Improvement Report IV-5.

ing improvement projects are completed each year, including 2,300 involving active warning devices. 1989 Report to Congress 4. But as we have noted, there are over 110,000 public grade crossings in the United States with no active warning signals, including 75,000 that do not have any advance warning signs of any kind, along with the 116,000 private grade crossings, that in general are not eligible for publicly funded improvements. 1990 Accident Bulletin 59, 63-64 (Tables 45, 48, 49); 1989 Report to Congress 3.

In sum, at current federal expenditure levels, it will require over 40 years to equip all existing public crossings with active warning devices. Of course, during that time thousands of new crossings will be created, and substantial funds will have to be expended to replace and upgrade existing warning devices. See 1989 Report to Congress 4-8. And that does not take private crossings into account.

In the meantime, if recent trends continue—and there is no reason to doubt that they will—accidents and deaths at grade crossings will continue to occur at increasing rates. The federal grade crossing safety improvement program has worked well, but there is much more that needs to be done and clearly the federal program cannot do it all by itself.

B. In The Past, Publicly Financed Programs And Railroad Expenditures Spurred By Reasonable Care Duties Have Worked Cooperatively To Improve Grade Crossing Safety.

Over the years, a three-pronged approach has been developed to deal with the problem of unsafe conditions at grade crossings. For over a century, under state common and statutory tort law, railroads have been responsible for warning travelers of approaching trains. See, e.g., *Continental Improvement Co. v. Stead*, 95 U.S. 1 (1877). That responsibility has occasioned the expenditure of hundreds of millions of dollars by the railroads

over the years to improve warning systems at grade crossings. For example, from 1985 to 1987, railroads spent on average more than \$10 million per year on privately funded installations of active warning devices at public crossings and over \$27 million per year on all types of improvements to public grade crossings. 1989 Report to Congress 3-8 (Table 3-3).

State and local governments have also played an important role in improving grade crossing safety. States have assessed a portion of the cost of improving grade crossings against the railroads themselves. The portion assessed against the railroads has varied over the years, and it varies from state to state. *See, e.g., Missouri Pacific Railroad v. Omaha*, 235 U.S. 121 (1914); *Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405 (1935); 1972 Report to Congress 26-27 (Table 11) (state by state percentage cost assessment to railroads on non-federal aid grade crossing projects); *see generally* 1971 Report to Congress Appendix A.

States continue to maintain independent grade crossing improvement programs, although in recent years more reliance has been placed on the federal programs. *See* 1971 Report to Congress A-20 - A-21. Currently, 16 states have separate state programs from which separate state safety grade crossing projects are funded. 1989 Report to Congress 3-6.

As we discussed above, since 1916 the federal government has made a significant commitment to improving grade crossing safety. However, throughout the decades the federal program has been in place, there has never been the slightest hint that Congress intended to supplant other parallel state and railroad safety efforts. Indeed in her 1972 and 1989 reports to Congress, the Secretary of Transportation ("Secretary") each time noted with approval the dual financial responsibility (railroad and public) for installing grade crossing protective devices. 1972 Report to Congress 33; 1989 Report to Congress 7

("Responsibilities for crossing improvements and maintenance are generally shared between public agencies and the railroads. . . . No recommended changes in the current responsibilities or programs are being recommended at this time."). Further, the Secretary's assumption of the railroads' continued tort liability for grade crossing accidents evidences her position that the federal crossing improvement program had not relieved the railroads' of their traditional responsibilities. *See infra*, 12 n.6, 14 n.8.

The multi-faceted, shared responsibility approach has worked well in correcting grade crossing safety problems. If railroad tort liability is preempted, however, railroads will have essentially no incentive to spend money to improve crossing safety. Overall national spending on crossing safety will be reduced by tens of millions of dollars yearly. This can only result in substantially diminished safety at grade crossings throughout the nation.

C. Elimination Of Railroads' Tort Responsibility Will Eliminate Their Incentive To Independently Make Safety Improvements At Grade Crossings.

The Secretary of Transportation has recognized that railroads are often in the best position to identify and correct grade crossing safety problems. *See, e.g.,* 1989 Report to Congress 3-4 ("The railroads' responsibility for the design and construction of crossing improvement projects generally applies to traffic control devices located at the crossing and involving connections to railroad signal systems. Railroads are involved in this aspect of improvement projects due to the interconnection with other railroad signal systems, the experience and expertise of their personnel, and railroad labor laws."); 1972 Report to Congress 33; Brief for the United States as Amicus Curiae Supporting Affirmance ("United States Brief") at 26 n.30. Indeed, it is just common sense that the rail-

roads are often in the best position to identify hazardous crossings and are generally the first to be aware of changed traffic conditions that dictate added precautions at particular crossings. It is also the railroads that have the flexibility to act quickly to rectify hazardous situations.⁵

Under the current public/railroad shared responsibility system for ensuring that grade crossings are maintained in the safest possible condition, the railroad's potential tort liability is a powerful incentive for them to independently make grade crossing safety improvements where federal funds are unavailable. From 1985 through 1987, the Association of American Railroads estimated that its members paid out \$60 million per year in awards and settlements arising from grade crossing accidents and incurred at least that much again in litigation costs—over \$120 million total per year. 1989 Report to Congress 7-5.⁶ During that same period, as discussed above, the

⁵ The DOT has adopted various regulations setting forth detailed procedures that states must follow in identifying hazardous crossings and implementing improvements. See, e.g., 23 C.F.R. § 924.7 (guidelines for evaluating safety projects); 23 C.F.R. § 924.9(a) (guidelines for prioritization of grade crossing projects); and 23 C.F.R. § 646.214(b)(4) (requiring DOT approval of improvement projects). In addition, the states are working with limited amounts of money each year that are often earmarked for specific projects well in advance. See 23 U.S.C. § 130(p). Accordingly, the states, under the federal program, are locked into fixed procedures and schedules for crossing improvements and cannot quickly react to rapidly developing hazardous situations. On the other hand, railroads are free to act immediately when circumstances dictate, to secure public agency approval of their improvement plan, and to implement changes quickly. See United States Brief at 20 n.19.

⁶ The Secretary of Transportation, after noting the railroads' tort liability costs, stated that "[f]rom a future program standpoint, liability costs can best be addressed and, it is hoped, reduced through improved levels of devices at crossings, and the achievement of maximum effectiveness from the system components." 1989 Report to Congress 7-6. That is hardly the statement of an individ-

railroads spent more than \$27 million per year in independent grade crossing improvement projects to mitigate their tort exposure. 1989 Report to Congress 3-8.

Over the last century, independent railroad grade crossing projects have, at a plausible estimate, made tens of thousands of grade crossings safer, thereby improving crossings for which no federal funds were available or freeing up federal money for other crossing projects. If the railroads' crossing improvement projects have been even half as effective as federally funded projects (an 88% reduction in fatalities and a 62% reduction in injuries at improved crossings), tens of thousands of accidents have been prevented and thousands of lives saved through the railroads' independent efforts—efforts induced by state tort law requirements.

Despite the dramatic results of their grade crossing projects, Petitioner Cross-Respondent CSX Transportation, Inc. ("CSX") claims that it is now barred by federal law from undertaking independent grade crossing projects. CSX Brief 35, quoting *Hatfield v. Burlington N. R.R.*, 958 F.2d 320, 323 (10th Cir. 1992). That assertion is manifestly incorrect. CSX is at all times free to seek the approval of local authorities to improve grade crossings. But as a practical matter, if CSX and other railroads are relieved of tort liability, they would have no incentive to act independently and the tens of millions of dollars they are now spending annually to install active warning devices and make other safety improvements at grade crossings would not be spent.

The impact on grade crossing safety is obvious. Accidents that would otherwise have been prevented will continue to occur and hundreds of lives will be lost that could have been saved.

ual who thought that the railroads' ordinary tort liability had been preempted in any way.

Exacerbating this anti-safety result is CSX's further claim that federal law now preempts not only the railroads' state common law duties, but also prohibits the states from requiring the railroads to share in the cost of non-federal state grade crossing improvement projects. CSX Brief at 22, 42.⁷ This extension of the preemption analysis will eviscerate most states' grade crossing programs which often rely heavily on the railroads' financial participation. See 1972 Report to Congress 26-27 (Table 11).⁸

Accordingly, the federal preemption position advocated by CSX will not only eliminate the first prong of the historic three tier system to enhance grade crossing safety (railroad action spurred by potential tort liability), it will also disable the second prong (state sponsored programs) by eliminating the states' ability to rely on the railroads for needed funding. The public and highway users will be left with only the federal grant program, which, by itself, is plainly not sufficient to do all that is necessary.

⁷ CSX blatantly ignores the fact that the limitations on a state's ability to require a railroad to contribute to a crossing improvement program (23 C.F.R. § 646.210) apply only to "Federal-aid projects." See also 1971 Report to Congress 19 ("[T]he financial responsibility of the parties—the railroads and the public highway authorities—having an interest in railroad-highway intersections is *governed by state laws and regulations*, except to the extent that improvement projects utilizing Federal-aid highway funds to pay a part or all of the cost are governed by Federal laws, rules and regulations." (Emphasis added)).

⁸ CSX argues that the Secretary's finding that improvements to certain grade crossing have no "net benefit" to the railroads is a strong indication that railroads have no continuing duty to make improvements to the crossings. CSX Brief at 34. To the contrary, the Secretary found that the railroads' tort liability costs were roughly equivalent to—and therefore offset by—its increased maintenance costs at improved crossings (thus no financial benefit to the railroad from the improvement). That is, the Secretary assumed that the railroads would continue to be subject to tort liability. See 1972 Report to Congress 102-104.

As discussed in the next section, Congress' stated purpose in enacting the Railroad Safety Act ("RSA") was to "promote safety." Surely, in the service of that important purpose, Congress did not invoke a form of federal preemption that would so inevitably lead to such an anti-safety result. The historic three tier shared responsibility system of promoting grade crossing safety is still needed to ensure highway users reasonably safe grade crossings.⁹

II. GRADE CROSSING SAFETY, NOT NATIONAL UNIFORMITY, HAS BEEN CONGRESS' GOAL IN ENACTING GRADE CROSSING SAFETY PROGRAMS.

CSX's claim for preemption rests entirely on 45 U.S.C. § 434, the RSA preemption provision, which it interprets as blindly enacting an iron rule of "uniformity" and "preemption." Of course, even the preemption provision itself recognizes that absolute uniformity is not practical or even desirable, "[t]he Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the *extent practicable*." 45 U.S.C. § 434 (emphasis added). Further, CSX's fixation on uniformity misses Congress' main purpose, which was "to promote *safety*"—not uniformity—"in all areas of railroad operations and to reduce railroad-related accidents." 45 U.S.C. § 421 (emphasis added).

Moreover, § 434's explicit preservation of any state "law, rule, regulation, order, or standard relating to railroad safety" until the Secretary "adopt[s] a rule, regula-

⁹ We note that the decades-long trend of reductions in grade crossing accidents reversed at approximately the same time that the railroads began advancing their grade crossing preemption claims in court (the early to mid 1980s) and began efforts to support those claims by cutting back or eliminating their independent grade crossing projects. Grade crossing accidents and fatalities have increased markedly over the last five years. 1991 Safety Improvement Report II-12.

tion, order, or standard covering the subject matter of such requirement" illustrates that safety, not uniformity, was Congress' primary concern. Congress clearly preferred leaving in place as many as 51 different state approaches to a railroad safety problem rather than running the risk of a regulatory gap that would eliminate any governmental regulation of a particular safety hazard.

A. Highway Users Benefit From And Support Uniform Federal Standards Which Enhance Highway Safety.

Highway user organizations, such as the amici here, often support federal preemption because the imposition of a national standard enhances highway safety. For example, federal safety standards regulating motor vehicle equipment, design, and performance enhance safety through uniformity. See 15 U.S.C. § 1392(d) (preempting motor vehicle safety standards not identical to federal standards); 49 C.F.R. Part 571 (setting forth Federal Motor Vehicle Safety Standards). It is easy to appreciate the negative impact on safety and commerce if motor vehicles were subject to varying, potentially inconsistent safety standards as they moved about the country. Likewise for trucking, in the area of hazardous material transportation, uniform standards relating to hazardous material classifications, packaging, placarding, and shipping documents enhance safety through uniformity and preemption. See 49 U.S.C. § 1804(a)(4); 49 C.F.R. § 107.202.

Similarly, in the area of rail/highway grade crossings, highway users recognize the importance of federal preemption, and the uniformity it creates, when that uniformity is based on the existence of an affirmative federal regulation covering the same subject matter and not simply a regulatory vacuum. Only then does uniformity actually promote safety and fulfill the core mandate of the RSA. For example, the U.S. Department of Transportation, *Manual on Uniform Traffic Control Devices* (1988) ("MUTCD")—promulgated as a federal regula-

tion (23 C.F.R. § 655.603)—requires public highways that cross a railroad track to bear certain pavement markings and signs (see *MUTCD* §§ 8B-1 to 8B-9), the appearance of which are described in great detail. In addition, for active devices at crossings, the Manual also sets forth specifications regarding appearance and placement (see *MUTCD* §§ 8C-1 to 8C-7). These requirements of visual uniformity promote highway safety because they "simplif[y] the task of the road user" and "aid[] in recognition and understanding." *MUTCD* § 1A-2.

B. No Federal Regulation Creates—Or Could Possibly Create—Uniformity In The Determination Of What Type Of Warning Devices, If Any, Is Needed At Particular Grade Crossings.

The *MUTCD* plainly does not, however, contain standards to guide the initial decision whether, or what type of, active warning device is required at any particular grade crossing.¹⁰ In fact, in several places, the Manual specifically states that determination is an engineering judgment beyond the *MUTCD*'s scope:

The decision to use a particular device at a particular location should be made on the basis of an engineering study of the location. Thus, while this Manual provides standards for design and application of traffic control devices, the Manual is not a substitute for engineering judgment. *It is the intent that the provisions of this Manual be standards for traffic control devices, installation, but not a legal requirement for installation.*

MUTCD § 1A-4 (emphasis added); see also 1989 Report to Congress 4-8 ("there are no warrants in the *MUTCD*

¹⁰ In analyzing the pros and cons of uniform warning systems at grade crossings, the Secretary observed that it was "necessary to achieve a reasonable degree of uniformity in practice nationwide", but expressed the concern that too rigid a uniformity could be a "deterrent for developing and testing new devices." 1971 Report to Congress 62 (emphasis added).

to specify the installation of certain devices at crossings with certain characteristics.").

The *MUTCD*'s provisions dealing with the selection of traffic control devices and systems at grade crossings likewise acknowledge that:

[d]ue to the large number of significant variables which must be considered there is no single standard system of active control devices universally applicable for grade crossings. Based on an engineering and traffic investigation, a determination is made whether any active traffic control system is required at a crossing and, if so, what type is appropriate.

Id. § 8D-1.

As previously discussed, under the traditional shared responsibility for grade crossing safety, it is often the railroads that are in the best position to make the judgment as to the need for and type of device required at a particular crossing. The peculiar hazards at individual crossings often come to the railroads' attention first and it is the railroads that have the flexibility to act quickly to supplement public programs and make needed improvements to dangerous crossings where public funds are lacking or where the crossing is low on the state's current priorities.

While agreeing with this general proposition, the government's brief notes that the Secretary's regulations do condition the expenditure of federal funds on a requirement that automatic gates be installed at certain types of crossings. The regulations further require DOT approval of the systems chosen to upgrade other crossings with federal monies. *See* 23 C.F.R. § 646.214(b). From those provisions, the government concludes that the Secretary has, in those instances, regulated the type of warning system needed at crossings that receive federal funds and that the railroads' further responsibilities at those crossings are thus preempted. United States Brief at 23-24.

The preemption system suggested by the United States is impractical and indeed may work against Congress' intent to promote safety. The government itself recognizes some of the impracticalities of the approach it proposes; for example, the government acknowledges that if circumstances later change at a federally improved crossing, making it no longer safe, the railroads will, if negligent, again be held liable in tort. *Id.* at 24 n.26. In the meantime, a railroad, complacent because of its presumed insulation from liability, may sit idly by no matter how dangerous a particular crossing may become or how much traffic patterns at the crossing may change.

From a practical point of view, however, the deeper problem with the government's approach is that regulations governing the expenditure of federal funds simply do not—in the words of 45 U.S.C. § 434, the provision on which CSX relies—"cover[] the [same] subject matter" as state tort law. The federal regulations concern how to best allocate scarce federal funds. As we explained above, while the federal government has devoted considerable resources to grade crossing improvements, those resources are not remotely adequate to address all the safety needs at the nation's grade crossings. Federal regulations "cover the subject matter" of how those funds should be spent to achieve the best results, given the limited funds available. State tort law duties, by contrast, require the railroads to provide a reasonable level of care at all the grade crossings that they use. That reasonable level of care in many instances will be much greater than what can be accomplished with federal funds that are limited and spread thin.

Moreover, the government's approach is inconsistent with the understandings that have prevailed in this area for decades. As we have explained, throughout the long history of government funding of grade crossing improvements, all parties concerned—the federal government, the states, highway users, and the railroads—all understood

government funding efforts to be a supplement to other sources of funds, including railroad expenditures prompted by their state law liability. Government funding, including federal funding, was never seen as a replacement for railroad responsibility. The Secretary of Transportation recognized the continued existence of railroad tort liability as late as 1989; indeed, the Secretary simply assumed that tort liability continued, notwithstanding the federal expenditures. 1989 Report to Congress 7-6. The Secretary made these statements long after the adoption of the regulations on which the government relies.

The better, more workable solution would be to continue to hold the railroad to its traditional common law duties. Of course, as a matter of state law, the fact that a particular crossing was improved with federal funds, or was evaluated by government officials and found not to need improvement, may furnish the railroad with a defense to tort liability. *See, e.g., Karl v. Burlington Northern R. Co.*, 880 F.2d 68, 76 (8th Cir. 1989); *See generally Restatement (Second) of Torts* § 288C, comment a (1965).

Throughout its brief, CSX urges this Court to ignore safety in the name of uniformity. *See, e.g., CSX Brief* at 7, 22, 41. There is, of course, no need for such a distasteful trade off. Assuming that a railroad may need to secure permission from an appropriate state agency for an independent grade crossing project, the only form of uniformity possible (in the appearance and placement of warning devices) can be ensured by requiring the railroad to conform its project to federal standards. Uniformity will be achieved and not at the expense of safety.¹¹

¹¹ The uniformity concerns that Congress sought to eliminate through the RSA's preemption provision dealt almost exclusively with subjecting the railroads to a variety of state enforcement and administrative requirements that could prove to be conflicting and burdensome. *See H.R. Rep. No. 1194, 91st Cong., 2d Sess.* 19 (1970) at 19 ("railroads should not be subject to [a] multiplicity of enforcement by various certifying States as well as the Federal Government").

III. PREEMPTION OF THE RAILROADS' RESPONSIBILITY TO OPERATE AT A SAFE SPEED (GIVEN ALL RELEVANT CIRCUMSTANCES) WILL DIMINISH HIGHWAY SAFETY.

A. Federal Speed Regulations Are Designed To Reduce The Risk Of Train Derailments.

The unmistakable function of DOT's train speed regulations (49 C.F.R. § 213) is to minimize derailments by setting forth the maximum speed that trains may use on each of six classes of track. The regulations (which, significantly, appear in the part of the Code of Federal Regulations entitled "Track Safety Standards") provide several criteria that a segment of track must meet to be included within a particular class.¹² These criteria relate to stability, strength, and other quality factors and have nothing to do with the location of the track, weather conditions, or other conditions that might warrant a reduced speed. *See, e.g., Sisk v. National R.R. Passenger Corp.*, 647 F. Supp. 861, 864 (D. Kan. 1986) ("These regulations are aimed at reducing the possibility of derailments and train collisions").

The history of the speed regulations unambiguously reveals that their intended function was to minimize derailments caused by speeds that were inappropriate for the kind of track involved. For example, the Secretary adopted higher speed limits for passenger trains than for freight trains, observing that the former had "a superior suspension system and lower center of gravity." 49 Fed. Reg. 20,336 (1971). Suspension and center of gravity affect the ability of the train to stay on its rails at a

¹² *See, e.g., 49 C.F.R. § 213.53* (specifying minimum and maximum gage for each class of track); *id.* § 213.55 (specifying maximum deviation from uniformity of alignment for each class of track); *id.* § 213.63 (specifying various track surface requirements for each class of track); *id.* § 213.109(c) (specifying required number of cross ties per 39-foot segment of track for each class of track); *id.* § 213.115 (specifying maximum permissible mismatch of rails at joints for each class of track).

given speed. The fact that two trains of identical weight are allowed to travel at different maximum speeds demonstrates that the Secretary was not attempting to establish a reasonable speed that was sensitive to such external factors as weather conditions, congested locations, etc.

B. Tort Responsibility Requires Railroads To Operate At Safe Speeds Under All Applicable Circumstances.

In Georgia a railroad "must exercise ordinary care" in controlling train speed. See *Atlantic Coast R.R. v. Grimes*, 109 S.E. 2d 890, 893 (Ga. Ct. App.) (1959). Obviously what constitutes a reasonably safe speed for operating a train depends upon a number of circumstances and not just track condition. Weather conditions that reduce visibility (fog, snow, rain, etc.) for both the train operator and motor vehicle driver dictate slower speeds. Population and traffic density also enter into the decision of what is a safe speed at a given location. In addition, many other external factors that the railroads are in a unique position to take into consideration (e.g. crossings in close proximity to schools or crossings with limited or partially obstructed track views) must be considered in selecting a reasonable speed. It is wholly implausible to suggest that in the name of safety, Congress and the Secretary eliminated the railroads' long-standing responsibility to take these other critically important factors into consideration when selecting a safe train operating speed.

C. The Arguments Against Holding Railroads To Ordinary Care Standards In Controlling Train Speed Ignore Relevant Aspects Of The Grade Crossing Safety Problem.

CSX's and the United States' arguments in support of preemption with respect to train speed ignore other practical aspects of the grade crossing safety problem as well. For example, each argues that the Secretary

has chosen to address grade crossing safety through warning devices, making train speed irrelevant. CSX Brief 46-48; United States Brief 29. This argument overlooks the obvious problem that about 65% of the nation's public crossings (over 110,000 crossings) and virtually all of the nation's 116,000 private crossings have no active warning devices to warn motorists of approaching trains.

The United States also alludes to purported safety problems with speed limitations arising from possible derailments caused by "emergency breaking." United States Brief 30. Of course, a state tort law requirement that trains proceed at a reasonable speed does not put them in emergency braking situations. Finally, CSX strongly implies that a train's speed is largely irrelevant to accident avoidance because a train, no matter the speed, cannot be stopped quickly or take evasive action to avoid an accident. CSX Brief 48-50. CSX's argument ignores the other side of the equation; motor vehicles can be stopped (or accelerate quickly) and can take evasive action. Of course, the slower the train's speed, the more reaction time motor vehicle drivers have and the greater their opportunity to maneuver to avoid a collision. A train's speed is thus hardly irrelevant to accident avoidance at grade crossings.

Allowing trains to operate at speeds checked only by federal regulations dealing with track standards will unquestionably have a negative impact on highway safety and will thus be directly contrary to Congress' intent in enacting the RSA.

CONCLUSION

The judgment of the court of appeals in No. 91-790 should be affirmed. The judgment of the court of appeals in No. 91-1206 should be reversed.

Respectfully submitted,

RICHARD A. ALLEN
ZUCKERT, SCOUTT & ROSENBERGER
888 Seventeenth Street, N.W.
Washington, D.C. 20006-3959
(202) 298-8660
*Attorney for National Private
Truck Council, Inc.*

CHARLES A. WEBB
5127 N. 27th Road
Arlington, VA 22207
(703) 528-2266
*Attorney for American Bus
Association, Inc.*

October 13, 1992

DANIEL R. BARNEY
ROBERT S. DIGGES, JR.
Counsel of Record
ATA LITIGATION CENTER
2200 Mill Road
Alexandria, VA 22314-4677
(703) 838-1865

PROF. DAVID A. STRAUSS
1111 East 60th Street
Chicago, IL 60637
(312) 702-9601
*Attorneys for American
Trucking Associations, Inc.*

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CSX TRANSPORTATION, INC.,

Petitioner,

v.

LIZZY BEATRICE EASTERWOOD,

Respondent,

LIZZY BEATRICE EASTERWOOD,

Cross-Petitioner,

v.

CSX TRANSPORTATION, INC.,

Cross-Respondent.

On Writs Of Certiorari To The
United States Court Of Appeals For The Eleventh Circuit

**BRIEF OF AMICI CURIAE
ASSOCIATION OF TRIAL LAWYERS OF AMERICA
TRIAL LAWYERS FOR PUBLIC JUSTICE
IN SUPPORT OF RESPONDENT/ CROSS PETITIONER
EASTERWOOD**

Roxanne Barton Conlin, Esq.
Jeffrey Robert White, Esq.
*Association of Trial Lawyers
of America*
1050 31st St., N.W.
Washington, DC 20007
(202) 965-3500

Priscilla Budeiri, Esq.
Arthur H. Bryant, Esq.
Trial Lawyers for Public Justice, P.C
1625 Massachusetts Ave., N.W.
Washington, DC 20036
(202) 797-8600

Dale Haralson, Esq.*
Adam Levine, Esq.
HARALSON, KINERK &
MOREY, P.C.
28 South Stone Ave.
Tucson, Arizona 85701
(602) 792-4330
Attorneys for Amici Curiae
*Counsel of Record

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICI CURIAE.....	1
SUMMARY OF ARGUMENT.....	2
ARGUMENT	4
I. THE FEDERAL RAILROAD SAFETY ACT WAS NEVER INTENDED TO PREEMPT STATE COMMON LAW TORT LIABILITY.....	4
A Preemption Analysis Begins With A Strong Presumption Against Preemption And Requires Unambiguous Congressional Intent.....	4
B. The Federal Railroad Safety Act Expressly Preempts State Law Only Where The Secretary Of Transportation Has Regulated The Same Subject Matter And Expressly Preserves Those State Laws Necessary To Eliminate Local Safety Hazards.	5
II. CONGRESS HAS NOT ADOPTED ANY COMPREHENSIVE APPROACH TO GRADE CROSSING SAFETY INTENDED TO PREEMPT STATE LAWS.....	11
A. The Grade Crossing Signal Regulations Adopted Under the FRSA Do Not Preempt State Laws.	12
B. Federal-Aid Funding For Grade Crossing Improve- ments Does Not Preempt State Law Under the FRSA.....	14

C. Common Law Actions For Damages Are Preserved Under The Local Hazards Exception of 45 U.S.C.A. § 434.	22
III. STATE COMMON-LAW CLAIMS BASED UPON NEGLIGENT OPERATION OF LOCOMOTIVES AT UNREASONABLE SPEEDS ARE NOT PREEMPTED BY FRSA.	24
CONCLUSION	30

TABLE OF AUTHORITIES

Cases

<i>Abbot v. American Cyanamid Co.</i> , 844 F.2d 1108 (4th Cir. 1988)	5
<i>Bethlehem Steel Co. v. New York State Labor Relations Board</i> , 330 U.S. 767 (1947)	21
<i>Bowen v. Massachusetts</i> , 487 U.S. 879 (1988)	10
<i>California Federal Savings and Loan Ass'n v. Guerra</i> , 479 U.S. 272 (1987)	4
<i>Cipollone v. Liggett Group, Inc.</i> , 112 S. Ct. 2608 (1992)	5, 7, 8
<i>Easterwood v. CSX Transp. Inc.</i> , 933 F.2d 1548 (11th Cir. 1991)	20, 23, 26
<i>Edwards v. Union Pacific Railroad Systems</i> , No. CJ-90-8195 (D.Okla. 1991)	27
<i>Farmer v. United Brotherhood of Carpenters</i> , 430 U.S. 290 (1977)	13
<i>Florida Lime and Avocado Growers, Inc. v. Paul</i> , 373 U.S. 132 (1963)	4
<i>Goodyear Atomic Corp. v. Miller</i> , 486 U.S. 174 (1988)	8
<i>Hillsborough County v. Automated Medical Laboratories</i> , 471 U.S. 707 (1985)	14, 21
<i>Jones v. Rath Packing Co.</i> , 430 U.S. 519, 525 (1977).	5
<i>Lloyd v. Southern Pac. Co.</i> , 245 P.2d 583 (Cal.App. 1954)	16
<i>Mahoney v. CSX Transportation, Inc.</i> , 966 F.2d 644 (11th Cir. 1992)	28
<i>National Association of Regulatory Commissioners v. Coleman</i> , 542 F.2d 11 (3rd Cir. 1976)	22
<i>New York v. United States</i> , 112 S.Ct. 2408 (1992)	17
<i>Penn Dairies v. Milk Control Comm'n.</i> , 318 U.S. 261 (1943)	5
<i>Rice v. Santa Fe Elev. Corp.</i> , 331 U.S. 218, 230 (1947) ...	4,5
<i>Rogers v. Missouri Pac. R. Co.</i> , 352 U.S. 500 (1959)	10
<i>San Diego Bldg. and Trades Council v. Garmon</i> , 359 U.S. 236 (1959)	24
<i>Silkwood v. Kerr-McGee Corp.</i> , 464 U.S. 238 (1984)	21
<i>South Dakota v. Dole</i> , 483 U.S. 206 (1987)	20

<i>Southern Ry Co. v. Georgia Kraft Co.</i> , 373 S.E.2d 774 (Ga.App. 1988).....	16
<i>State of Nebraska, Dept. of Roads v. Tiemann</i> , 510 F.2d 446 (8th Cir. 1975).....	19, 20
<i>State Ex rel Secretary v. Matthews Realty Co.</i> , 514 A.2d 1123 (Del. Super. 1986)	20
<i>United States v. Bass</i> , 404 U.S. 336 (1971).....	4
<i>Wisconsin Public Intervenor v. Mortier</i> , 111 S.Ct 2476 (1991)	29

Statutes and Regulations

23 U.S.C.A. § 101	12
23 U.S.C. § 109(e), § 130, and § 402	20
23 U.S.C.A. § 130	15
23 U.S.C. § 145	20
23 U.S.C. § 409	10
45 U.S.C.A. § 51 (FELA)	10
45 U.S.C.A. § 421	6
45 U.S.C.A. § 431	passim
45 U.S.C.A. § 431 (q).....	12
45 U.S.C.A. § 433(b).....	18
45 U.S.C.A. § 434	passim
45 U.S.C.A. §§ 435 and 436	9
45 U.S.C.A. § 656	29
23 C.F.R. §§ 1.9 and 1.36	20
23 C.F.R. §§ 646.214.....	15, 19
23 C.F.R. § 655.603.....	15
49 C.F.R. § 234	12
49 C.F.R. § 1.48	18
49 C.F.R. § 1.49	18
49 C.F.R. § 1.49(m).....	12
49 C.F.R. § 234	14
49 C.F.R. § 213.9	25, 26, 27, 28

36 Fed. Reg. 20336 (1971)	27
56 Fed. Reg. at 33728.....	13

Other Authorities

Executive Order 12612 (Oct. 26, 1987)	13
H.R. REP. NO. 1194, 91st Cong., 2nd Sess. 11, <i>reprinted</i> in 1970 U.S. CODE CONG. & ADMIN NEWS, 4104	6, 8, 23
Manual on Uniform Traffic Control Devices	15, 16, 17, 19, 23
RAIL-HIGHWAY CROSSING STUDY (1989).....	17, 18, 24
RAILROAD-HIGHWAY GRADE CROSSING HANDBOOK, Federal Highway Administration, U.S. Dept. of Transportation (2d ed. 1986)	24
<i>Railroad Safety and Hazardous Material Control:</i> <i>Hearings on H.R. 7068, 14417, 14478 and S. 1933</i> <i>Before the Subcommittee on Transportation</i> <i>and Aeronautics of the Committee on Interstate</i> <i>and Foreign Commerce, House of Representatives,</i> 91st Cong., 2nd Sess. (1970)	6, 8, 10, 22
REPORT TO CONGRESS - RAILROAD HIGHWAY SAFETY PART I: A COMPREHENSIVE STATEMENT OF THE PROBLEM and PART II - RECOMMENDATIONS FOR SOLVING THE PROBLEM	14, 15, 17
<i>Restatement (Second) of Torts</i> §288C (1965).....	19, 28
SENATE REPORT No. 91-619, Dec. 18, 1969	9

IN THE
Supreme Court of the United States
October Term, 1992

Nos. 91-790 and 91-1206

CSX TRANSPORTATION, INC.,
Petitioner,
v.
LIZZY BEATRICE EASTERWOOD,
Respondent,

LIZZY BEATRICE EASTERWOOD,
Cross-Petitioner,
v.
CSX TRANSPORTATION, INC.,
Cross-Respondent.

On Writs Of Certiorari To The
United States Court Of Appeals For The Eleventh Circuit

**BRIEF OF AMICI CURIAE
ASSOCIATION OF TRIAL LAWYERS OF AMERICA
TRIAL LAWYERS FOR PUBLIC JUSTICE
SUPPORTING RESPONDENT/CROSS PETITIONER
EASTERWOOD**

INTEREST OF THE AMICI CURIAE

The Association of Trial Lawyers of America ["ATLA"] is a voluntary national bar association whose 65,000 members primarily represent injured plaintiffs, including those injured in railroad highway grade crossing collisions.

Trial Lawyers for Public Justice, P.C. ["TLPJ"], is a national public interest law firm that represents victims of corporate and government misconduct in precedent-setting

and socially significant litigation. Supported by and utilizing the skills of nearly 1300 trial lawyers nationwide, TLPJ is dedicated to the preservation of the states' individual tort systems as the surest, and often sole, means to compensate injury victims.

ATLA and TLPJ are particularly interested in this case because resolution of whether the Federal Railroad Safety Act preempts state tort law may determine whether thousands of innocent victims obtain compensation and whether wrongful conduct by our country's railroads will be deterred.

The importance of this Court's decision cannot be overstated. There are approximately 174,000 public railroad-highway grade crossings in the United States. The past ten years saw more than 6,000 deaths and 24,000 injuries in public grade crossing accidents. ATLA and TLPJ submit that the position advanced by CSX and its supporting amici misinterpret the provisions of the FRSA and misapply the basic tenets of the preemption doctrine. Adoption of that position would increase the carnage resulting from railroad-highway grade crossing accidents and deprive the victims of such accidents of any remedy or compensation at law.

Letters have been filed with the Clerk of the Court reflecting the parties' consent to the filing of this brief.

SUMMARY OF ARGUMENT

Congress enacted the the Federal Railroad Safety Act, 45 U.S.C.A. § 421 *et seq.* to impart a degree of national uniformity to railroad safety regulations. The question before this Court is whether Congress also intended to deprive victims of grade crossing accidents, such as Mrs. Easterwood, of the right to seek compensation for tortious injury under state law.

This Court has emphasized that there is a strong presumption against preemption of state law, particularly state tort law. This Court has further held that express preemption provisions shall be narrowly construed.

It is clear that Congress intended the express preemption provision in the FRSA affect only positive enactments of state legislatures and state regulatory agencies. Congress did not intend to eliminate state tort liability, which exerts only indirect regulatory influence.

Even if tort law were deemed to be within the scope of the preemption provision, preemption of state law liability for negligent crossing design has not been triggered under the terms of the statute. The Secretary of Transportation has not promulgated regulations concerning adequate warning devices at grade crossings. The regulations identified by CSX were not adopted pursuant to the FRSA and do not address railroad safety: They are simply a federal funding program offering financial assistance to states to improve grade crossings. In addition, the Manual of Uniform Traffic Control Devices does relieve railroads of their common-law responsibility for crossing safety. Nor does it divest the states of their police power to regulate safety at grade crossings.

Similarly, the federal government does not set speed limits for trains. Federal track class/speed regulations are merely technical standards relating to the physical condition of railroad tracks. The Federal Railroad Authority has clearly designated these as *minimum* safety standards. They do not prohibit states from imposing on railroads the duty to exercise reasonable care in the speeds at which they operate their trains.

Moreover, regardless of any regulations promulgated by the Secretary, Congress explicitly exempted from preemption state regulations that address "an essentially local safety hazard." Railroad highway grade crossings are local hazards

by their very nature. Imposing a duty of due care under the circumstances at various grade crossings with respect to warnings and train speeds clearly falls within this exception.

Finally, preempting state tort liability for inadequate regard to grade crossing signalization and excessive train speed would remove all incentives for the railroads to exercise reasonable care and leave thousand of accident victims without any remedy. There is no indication that Congress intended such a result. The strong presumption against the preemption of state tort remedies compels the rejection of attempts to supply congressional intent that was not clearly stated by Congress.

ARGUMENT

I. THE FEDERAL RAILROAD SAFETY ACT WAS NEVER INTENDED TO PREEMPT STATE COMMON LAW TORT LIABILITY.

A. Preemption Analysis Begins With A Strong Presumption Against Preemption And Requires Unambiguous Congressional Intent.

In determining whether federal law preempts state law, a court's "sole task is to ascertain the intent of Congress." *California Federal Savings and Loan Ass'n v. Guerra*, 479 U.S. 272, 280 (1987). Preemption of state law is not to be found absent an "unambiguous congressional mandate to that effect." *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146-147 (1963). Preemption analysis must "start with the assumption that the historic police powers of the states were not to be superseded by [a] federal act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Corp.*, 331 U.S. 218, 230 (1947). "This assumption provides assurance that 'the federal-state balance,' *United States v. Bass*, 404 U.S. 336, 349 (1971), will not be disturbed unintentionally by Congress or unnecessarily by the

courts." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

Caution in displacing state law is justified because Congress certainly has the power to "act so unequivocally as to make it clear that it intends no regulation but its own." *Rice*, 331 U.S. at 236. If any doubts exist as to congressional purpose, this Court should be slow to find preemption because the states will be powerless to remove any ill effects occasioned by the preemption of their laws, while the national government, which has the ultimate power, remains free to remove any burden. *Penn Dairies v. Milk Control Comm'n.*, 318 U.S. 261, 276 (1943). Moreover, "[t]he presumption against pre-emption is even stronger against pre-emption of state remedies, like tort recoveries, when no federal remedies exist." *Abbot v. American Cyanamid Co.*, 844 F.2d 1108 (4th Cir. 1988).

Congressional intent to preempt state law may be "explicitly stated in [a] statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.*, *supra* at 525. This Court has recently explained that the presence of an express preemption provision eliminates any need to resort to implied preemption. Where "Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and where that provision provides a reliable indicium of congressional intent with respect to state authority ... there is no need to infer congressional intent to pre-empt from the substantive provisions of the legislation." *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2618 (1992). Accordingly, this Court "need only identify the domain expressly preempted" by the statutory language and narrowly construe its terms "in light of the presumption against the preemption of state police power regulations." *Id.*

B. The Federal Railroad Safety Act Expressly Preempts State Law Only Where The Secretary

Of Transportation Has Regulated The Same Subject Matter And Expressly Preserves Those State Laws Necessary To Eliminate Local Safety Hazards.

The FRSA was enacted by Congress for the purposes of "promoting safety in all areas of railroad operations" and to permit the establishment of nationally uniform regulations and standards. 45 U.S.C.A. § 421 *et seq.*; H.R. REP. NO. 1194, 91st Cong., 2nd Sess. 11, *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS, 4104, 4105-4108 (hereafter "HOUSE REPORT"). The FRSA provides a comprehensive regulatory scheme to achieve this goal and vests the Secretary of Transportation with authority to "prescribe, as necessary, appropriate rules, regulations, orders and standards for all areas of railroad safety." 45 U.S.C.A. §431(a).

The extent to which states would be permitted to regulate rail safety apart from the FRSA was vigorously debated by Congress. *See Railroad Safety and Hazardous Material Control: Hearings on H.R. 7068, 14417, 14478 and S. 1933 Before the Subcommittee on Transportation and Aeronautics of the Committee on Interstate and Foreign Commerce, House of Representatives, 91st Cong., 2nd Sess. p. 32 (1970)* (hereafter "*Subcommittee Hearings*"). Ultimately, a compromise was reached which Congress believed would result in national rail safety regulations while preserving those elements of state law which were conducive to promoting rail safety. Accordingly, the FRSA contains an express preemption provision which provides:

The Congress declares that all laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue to enforce any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a

rule, regulation, order, or standard covering the subject matter of such state requirement. A State may adopt or continue to enforce an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

45 U.S.C.A. § 434.

This provision is notable for the narrow scope of the express preemption mandated by Congress. This section explicitly preserves a state's power to regulate rail safety until such time as the Secretary exercises authority under § 431 to regulate a specific area. Additionally, § 434 preserves state law *even where the Secretary has invoked the authority to promulgate rail safety regulations under § 431 and intends to preempt state law to the contrary* where state regulation is "necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce."

Section 434 of title 45 is an express statement of congressional intent to preempt state law. Accordingly, this Court "must fairly but -- in light of the strong presumption against preemption -- narrowly construe its precise language." *Cipollone*, at 2621. In contrast, CSX urges this Court to dispense with a narrow construction of § 434 in order to find common-law tort actions encompassed within the language of the statute. According to CSX, the presumption against preemption should yield to the perceived breadth of the language "any law . . . relating to railroad safety." However, both the language and scope of § 434 must

be evaluated within the context of the FRSA's legislative history. *Cf. Cipollone*, at 2619 n.16.

The legislative history reveals that the motivating force behind the FRSA was a need to address the patchwork of state and federal regulations covering such diverse subjects as track construction and performance, roadbed, rolling stock, design, construction, signal systems, maintenance, and employee qualification and training. *See HOUSE REPORT* at 4108; *Subcommittee Hearings* at 23 (letter of Secretary of Transportation John A. Volpe), & 26 (Statement of Hon. Ogden R. Reid). Viewed within this context, it is clear that the phrase "laws, rules, regulations, orders, and standards relating to railroad safety" in § 434 was not intended to encompass state common law tort actions. Rather, Congress merely sought uniformity among the positive enactments of state legislatures and regulatory agencies which impacted directly upon the safety of railroad operations. "Congress may reasonably determine that incidental regulatory pressure is acceptable, whereas direct regulatory authority is not." *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185 (1988). While common-law damage actions may impart an indirect regulatory effect upon a party's behavior, *see Cipollone*, *supra* at 4712 (Blackmun, J., concurring in part, dissenting in part), such indirect influence was never identified by Congress as inimical to rail safety or incompatible with the goals of the FRSA.

CSX and its supporting *amici* have rely upon language from the legislative history of the FRSA indicating that Congress did "not believe that safety in the nation's railroads would be advanced sufficiently by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems." *HOUSE REPORT* at 4108. *Amici* submit that citation to this passage for the proposition that § 434 preempts state tort liability lifts Congress' language entirely and misleadingly out of context. The quoted passage appears in a section of the *HOUSE REPORT* entitled "The Role

of the States and Rail Safety" and has absolutely nothing to do with the preemption provisions of the FRSA. Rather, this language relates to the debate over the proper role to be played by the state regulatory commissions in the enforcement of *federal* regulations. See 45 U.S.C.A. §§ 435 and 436. Viewed in context, it is clear that Congress was referring only to the problems associated with different state regulatory agencies imposing fines for violating federal regulations. This quote, which has been widely misconstrued by lower courts in order to find unwarranted preemption of tort liability, was never addressed to the issue of whether states may continue to regulate rail safety apart from the FRSA and provides no basis for extending federal preemption to common law tort actions.

The legislative history of the FRSA conclusively reveals that Congress envisioned the continuing viability of state common law damage actions. According to the report of the Senate Commerce Committee accompanying S. 1933 (the original form of the Act):

This bill contains no provision prohibiting the use of accident reports as evidence in any action for damages. The committee intends that individuals have access to such reports for the purpose of assisting them in any cause of action growing out of an accident. The committee notes that quite often the injured party's situation is such that without benefit of governmentally developed information the party would be unable to produce sufficient evidence to prove his case.

SENATE REPORT No. 91-619, Dec. 18, 1969 at p. 12.

When Hearings on S. 1933 were later conducted before the House Subcommittee on Transportation and Aeronautics, the subject was raised again by Secretary of Transportation

John A. Volpe. See *Subcommittee Hearings* at p. 32. Ultimately, Congress chose to address this issue outside of the FRSA and has implemented a statutory ban on the use of certain reports in tort actions. See 23 U.S.C. §409. If common law damage actions with regard to rail safety were preempted by the FRSA, 23 U.S.C.A. § 409 would be superfluous. Congress is presumed to understand existing law when it legislates, *Bowen v. Massachusetts*, 487 U.S. 879, 880 (1988), and the fact that Congress felt compelled to address this issue, both in the legislative history of the FRSA, and in subsequent legislation under 23 U.S.C.A. § 409, is convincing evidence that common law actions for damages are not preempted under the language of § 434.¹

While the briefs of CSX and *amicus curiae* Association of American Railroads disparage jury damage awards as "subjective," "retrospective," "uncoordinated," and "*ad hoc*," Congress itself has expressly sanctioned the use of fault-based jury awards to compensate railroad employees injured on the job as a result of a railroad's negligence. See Federal Employer's Liability Act (FELA), 45 U.S.C.A. § 51 *et seq.*; *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500 (1959). A determination that the phrase "law, rule, regulation, order, or standard" as used in § 434 encompasses state common law damage actions would lead to the bizarre result that a railroad employee injured in a grade crossing collision caused by

¹Under earlier proposed drafts of the legislation, existing rail safety statutes, "as well as outstanding orders rules, regulations, standards, requirements and permits," were to be repealed and their substantive safety requirements continued in effect as regulations of the Secretary. See *Subcommittee Hearings* at p. 23 (letter from Secretary Volpe to Hon. John W. McCormack, Speaker, U.S. House of Representatives). This proposal, ultimately rejected, was criticized on the grounds that it would eliminate the principle of negligence *per se* in damage actions and that the substantive requirements adopted in regulatory form would only be standards against which negligent conduct might be measured. See *Subcommittee Hearings* at 177 (Statement of Al H. Chesser).

a railroad's negligence would be entitled to seek compensation under common-law tort principles, while a private citizen suffering the same injuries in the same crash due to the same negligence would be without remedy. There is no indication that Congress intended such an anomaly.

While the nation's rail system is unquestionably important to interstate commerce, other modes of transportation, including air travel, highway traffic, and maritime commerce, are also subject to congressional regulation. In no instance has Congress relieved a provider of transportation of the requirement of due care under the circumstances to avoid causing injury. The FRSA does not authorize railroads to operate without regard for the lives and property of others. Indeed, requiring railroads to exercise reasonable care serves to advance the congressional purpose of the FRSA "to promote safety in all areas of railroad operations and to reduce railroad-related accidents, and to reduce deaths and injuries to persons and to reduce damage to property caused by accidents involving any carrier of hazardous materials." 45 U.S.C.A. §421.

II. CONGRESS HAS NOT ADOPTED ANY COMPREHENSIVE APPROACH TO GRADE CROSSING SAFETY INTENDED TO PREEMPT STATE LAWS.

Even if the provisions of 45 U.S.C.A. § 434 could plausibly be construed to encompass common-law damage actions, such suits would still not be preempted. The Secretary of Transportation has not promulgated any regulations covering the subject matter of adequate warning devices for railroad-highway grade crossings. The plain language of § 434 makes such action by the Secretary a condition precedent to preemption.

What CSX identifies as a "prospective-looking regulatory scheme" consists merely of the highway funding

provisions of the Federal-Aid program, 23 U.S.C.A. § 101 *et seq.* They cannot be viewed, as CSX argues, as a comprehensive scheme that "covers the subject matter" of railroad-highway grade crossing safety by conscripting state agencies and delegating to them duties which the railroads, in the exercise of due care, might otherwise be obliged to obey.

A. The Grade Crossing Signal Regulations Adopted Under the FRSA Do Not Preempt State Laws.

CSX's entire theory of preemption is premised upon the erroneous notion that the federal program which dispenses federal highway funds to the states is encompassed within the express preemption provisions of the FRSA. This is simply incorrect. The FRSA is a distinct, complete, and self contained regulatory scheme which does not require cross-wiring with other congressional programs.

In order to facilitate the FRSA's ultimate goal of rail safety, the Secretary of Transportation has authority to determine which, if any, areas of rail safety are in need of national uniformity, and prescribe such nationally uniform regulations and standards. 45 U.S.C.A. § 431(a). These regulations and standards preempt state laws and regulations covering the same subject matter unless necessary to eliminate a local safety hazard. 45 U.S.C.A. § 434. This authority to promulgate preemptive regulations and standards was subsequently delegated to the Federal Railroad Authority [hereinafter "FRA"]. See 49 C.F.R. § 1.49(m).

The FRA has not mandated nationally uniform regulations governing the selection of appropriate warning devices at railroad-highway grade crossings. Rather, in response to a 1988 amendment to the FRSA, 45 U.S.C.A. § 431 (q), the FRA has promulgated regulations addressing only the maintenance, inspection and testing of grade crossing warning devices. See 49 C.F.R. § 234 *et seq.* The grade crossing signalization regulations enacted by the FRA require

railroads, under penalty of civil and criminal sanction, to report all accidents involving grade crossing signal failures, file with the FRA information regarding circuit type and component age for all active rail-highway grade crossing signal systems, and provide the FRA with a current rules and procedures for inspecting and maintaining such systems.

The duty imposed by state common law is one of reasonable care in providing adequate warning of the approach of its trains. Accordingly, the regulations adopted by the FRA at 49 C.F.R. § 234 *et seq.* clearly do not address the subject matter which is the focus of Mrs. Easterwood's tort claim. This conclusion is supported by the FRA's prefatory comments in the Federal Register:

This action has been analyzed in accordance with the principles and criteria in Executive Order 12612, and it has been determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

"Federalism Implications," 56 Fed. Reg. at 33728.²

²Executive Order Number 12612, issued by President Ronald Reagan October 26, 1987, reaffirms fundamental principles of federalism and directs executive branch departments and agencies authorized to issue preemptive regulations to minimize any preemption of state law. Section 4(c) of this Order mandates that any required preemption of state law "shall be restricted to the minimum level necessary". Additionally, section 6 requires any Executive branch actions with sufficient federalism implications to be accompanied by a "Federalism Assessment". This Assessment must identify the extent to which any regulations would "affect the State's ability to discharge traditional government functions". See § 6(c)(4). Common law tort remedies have long been recognized by this Court as such a traditional state function. See *Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290, 304 (1977).

This Court has emphasized that federal regulations will not be deemed to preempt state law unless the issuing federal agency expressly declares its intent. *Hillsborough County v. Automated Medical Laboratories*, 471 U.S. 707, 714 (1985). The regulations at 49 C.F.R. § 234 constitute the *only* action taken to date by the FRA with regard to grade crossings. In light of the limited subject matter addressed, and the "Federalism Implications" noted by the FRA in the Federal Register, there is no basis for CSX's assertion that the Secretary has covered the subject matter of the selection of grade crossing warning devices.

B. Federal-Aid Funding For Grade Crossing Improvements Does Not Preempt State Law Under the FRSA.

Because the FRA grade crossing regulations at 49 C.F.R. § 234 do not preempt state common law tort liability, CSX is forced to argue that an assortment of statutes and regulations addressing federal funding assistance to state highway programs collectively constitutes regulation of the "subject matter" of grade crossing signalization for purposes of 45 U.S.C.A. § 434. However, this argument is based upon the erroneous premise that regulations issued by agencies other than the FRA, and deriving their authority from legislation other than the FRSA, can preempt state laws under the express preemption provisions of the FRSA.

What CSX has mistaken for a prospective scheme designed to replace tort liability is nothing more than the program of federal assistance to state highway programs which has been extended to fund railroad-highway grade crossing improvements. This program resulted from the Secretary of Transportation's REPORT TO CONGRESS - RAILROAD HIGHWAY SAFETY PART I: A COMPREHENSIVE STATEMENT OF THE PROBLEM and PART II - RECOMMENDATIONS FOR SOLVING THE PROBLEM (hereafter "REPORT TO CONGRESS") which concluded that the best

approach to grade crossing safety was through increased federal assistance to state programs to upgrade or eliminate crossings. *Id.*, PART II at 107-108.³

Following the Secretary's recommendation, Congress chose to include railroad-highway crossing improvements as an aspect of highway construction in order to make federal funds available. To receive these funds, a state must set up a hazard ranking system for grade crossings which will prioritize funds for those crossings posing the greatest danger. *See* 23 U.S.C.A. § 130.

CSX erroneously relies upon the Manual on Uniform Traffic Control Devices ["MUTCD"], adopted by the Federal Highway Administration ["FHWA"] under 23 C.F.R. §§ 646.214 and 655.603 as the national standard for all projects in which federal-aid funds participate. Part VIII states:

The determination of need and selection of devices at a grade crossing is made by the public agency with jurisdictional authority. Subject to such determination and selection, the design, installation and operation shall be in accordance with the national standards contained herein.

MUTCD at § 8A-1.

According to CSX, this language divests the states of their police power over grade crossings, and cloaks the local agencies of the states within a mantle of federal authority to determine appropriate grade crossing signalization. Because local authorities make the decision regarding crossing signals on behalf of the federal government, CSX concludes that

³ The REPORT TO CONGRESS was jointly authorized under the FRSA, 45 U.S.C.A. §433(a), and the Federal Highway Safety Act, 23 U.S.C.A. § 322(a)(subsequently repealed).

railroads have no corresponding responsibility in this area and cannot be held liable under common law.

Neither the quoted language of the MUTCD, nor the means of its adoption, supports CSX's position. The MUTCD is an engineering manual drafted through the coordinated efforts of federal and state traffic engineers under the supervision of the FHWA. It has existed in one form or another since 1935. While the MUTCD sets forth the physical specifications for traffic control devices and their use, and includes a section addressing grade crossing signalization, it does not prescribe substantive standards for determining whether an active warning device, or any other form of signalization, is required at a particular crossing. In fact, the MUTCD specifically states that this determination constitutes an engineering judgment beyond the Manual's scope. MUTCD § 1A-4. Accordingly, the MUTCD specifically avoids setting forth substantive standards governing the decision that a particular form of crossing device is required.

The MUTCD language which refers to "public agencies with jurisdictional authority" is purely descriptive and does not evidence any intent to alter a railroad's responsibility at common law. CSX has wholly misinterpreted this passage. It does not relate to the duty to ascertain the need for grade crossing protection. It merely recognizes that the authority to regulate railroad-highway grade crossings has always been part of the state's police power under our federal system. This same police power permits states to impose on railroads responsibility for grade crossing safety. A railroad may propose or install at its own expense warning devices beyond those required by local regulatory authorities, and failure to do so may constitute a breach of reasonable care. *See, e.g., Southern Ry Co. v. Georgia Kraft Co.*, 373 S.E.2d 774 (Ga.App. 1988); *Lloyd v. Southern Pac. Co.*, 245 P.2d 583,

There is no reference to this asserted delegation, so essential to CSX's preemption argument, in any statute, regulation, legislative history or government report. The 1971-72 REPORT TO CONGRESS which proposed the § 130 funding program did not recommend that a federal scheme based upon prioritization be implemented under the FRSA to replace tort liability, or suggest that local agencies operating under color of federal authority relieve railroads of their common law duties. Rather, the REPORT reveals that the states may "legally and constitutionally require the railroads to bear the entire responsibility" for grade crossing safety, PART I Appendix A at A-31, and notes that a railroad may be held liable for damages even where the MUTCD is complied with. *Id.* at 62-63.

In 1989, the U.S. Department of Transportation issued the RAIL-HIGHWAY CROSSING STUDY which updates the REPORT TO CONGRESS and details both the history and nature of the § 130 funding program. This study clearly reveals that railroads are responsible for signalization at grade crossings (p.3-4) and that liability may be imposed upon railroads for grade crossing accidents (pp. 3-1, 7-5). Nothing in the Study supports the notion that the federal-aid program was intended to replace common-law damage actions or that the MUTCD in any way alters the traditional role of the states.⁵

⁴ The brief of *amicus curiae* United States has similarly characterized the language of the MUTCD as merely descriptive and rejected any notion that the MUTCD relieves the railroads of any common law duty to provide for a safe grade crossing.

⁵ It should be noted that the entire MUTCD/preemption scheme advocated by CSX would constitute an unconstitutional infringement upon state sovereignty under the principles recently set forth by this Court in *New York v. United States*, 112 S.Ct. 2408 (1992). The Secretary of Transportation cannot force the states, or the "public agency with jurisdictional authority" which is an agent of the state, to enact or administer a federal regulatory program. If the federal government desired to regulate the selection of crossing signalization, it must do so

Neither the MUTCD, nor any other regulation relied upon by CSX, was adopted by the FRA pursuant to its authority under 45 U.S.C.A. § 431. Rather, these regulations were adopted by the FHWA to supervise the use of federal-aid funds. The FHWA has been delegated the Secretary's authority to approve state highway safety programs and to establish prerequisites for federal funding. 23 U.S.C. §§ 109 and 402; 49 C.F.R. §§1.48(b)(8) and 1.48(n). CSX is simply incorrect when it asserts that the FHWA has been given authority to promulgate regulations implementing the Secretary of Transportation's responsibilities for grade crossing safety under the FRSA. The FHWA's role is limited to participating in a coordinated effort to study and solve the problem of grade crossing safety, 45 U.S.C.A. § 433(b) and 49 C.F.R. § 1.48(o), and there are no grounds for elevating such FHWA regulations to the same status as regulations promulgated by the FRA directly under the FRSA.

CSX argues that regulations adopted by the FHWA pursuant to its delegated authority over federal highway funding preempt state laws under 45 U.S.C.A. § 434 by virtue of the fact that the regulations were adopted by the Secretary and relate to rail safety. This argument fails to distinguish the two differing delegations of the Secretary's authority under 49 C.F.R. §§ 1.48 and 1.49. In fact, the regulations under title 23 C.F.R. do not relate to rail safety at all, but rather to the use of federal highway funds. This fact is made amply clear by the 1989 RAIL-HIGHWAY CROSSINGS STUDY which describes the role of the federal government in crossing improvement programs as "overseer to ensure that federal dollars are appropriately spent." At 3-2.

itself, or encourage the states to do so through the use of incentives. It may not, however, force the states to do so through the preemption language in 45 U.S.C.A. § 434. *See* 112 S.Ct. at 2435.

It would set a dangerous precedent to hold that regulations adopted separately and apart from the FRSA were intended to preempt state laws through the FRSA's express preemption provisions. In contrast to regulations adopted by the FRA under 45 U.S.C.A. § 431, regulations adopted by other bureaus and agencies within the Department of Transportation are not the result of a considered determination that national uniformity would be consistent with the FRSA's fundamental goal of railroad safety. Affording such regulations the same preemptive effect as regulations promulgated by the FRA would result in preemption of state law which was neither contemplated nor desired, and in turn, upset principles of federalism by displacing state law without the clear and unambiguous intent of the issuing federal agency.⁶

Finally, CSX's vision of a "prospective looking" preemptive scheme based upon § 130 prioritization of federal-aid funds overlooks the basic fact that participation in the federal-aid scheme is not mandatory. "A state is constitutionally free to operate its own highway system" and need not participate in the federal-aid system. *State of Nebraska, Dept. of Roads v. Tiemann*, 510 F.2d 446, 448 (8th Cir. 1975). In fact, Congress has explicitly re-affirmed state sovereignty under the federal-aid program stating:

The authorization of the appropriation of

⁶ Accordingly, the position taken by *amicus curiae* United States that preemption is limited to only those crossings actually improved with federal funds and meeting the warning requirements of 23 C.F.R. § 646.214(b) should also be rejected. As with the regulations adopting the MUTCD, the provisions of § 646.200 *et seq.* only provide guidelines for the use of federal highway funds. However, there is no indication that these regulations were issued by the FHWA with the intent of establishing a nationwide standard of care or prohibiting a railroad from taking additional precautions where a reasonable person would do so. See *Restatement (Second) of Torts* § 288 C.

federal funds or their availability for expenditure under this chapter, shall in no way infringe on the sovereign rights of the states to determine which projects shall be federally financed. The provisions of this chapter provide for a federally assisted state program.

23 U.S.C. § 145.

A state which applies for federal-aid funds does not thereby implicitly surrender its sovereignty over highways or grade crossings within its borders. While Congress may attach conditions to federal-aid highway funds, "it must do so unambiguously . . . , enabling the states to exercise their choice knowingly, cognizant of the consequences of their participation." *South Dakota v. Dole*, 483 U.S. 206 (1987). Assuming that Congress could attach conditions on federal-aid which would preempt common law damage actions, the Eleventh Circuit astutely observed that Congress did not do so in this case. *Easterwood*, 933 F.2d 1548, 1555.

Nothing in the federal scheme of providing financial aid to state highway programs reflects an effort on the part of Congress to deprive the states of their power to regulate or address grade crossing safety. As the Eleventh Circuit noted, there are no preemption clauses in any of these statutes, nor do they purport to draw upon the FRSA in that regard. 933 F.2d at 1555. Any conformance to a national scheme is wholly voluntary and arises by virtue of the fact that the federal government imposes certain requirements upon the states as conditions for federal funding. 23 U.S.C. § 109(e), §130, and §402. Within these broad guidelines for supervision, states are free to exercise their state highway programs as they see fit, subject to loss of federal funds for non-compliance with the requirements of the federal-aid system. See 23 C.F.R. §§ 1.9 and 1.36; *State of Nebraska Dept. of Roads v. Tiemann*, *supra*; *State Ex rel Secretary v. Matthews Realty Co.*, 514 A.2d 1123 (Del. Super. 1986).

Careful scrutiny of the FRSA, the federal-aid statutes, and the MUTCD reveals CSX's description of this purported statutory scheme for what it truly is -- an aggregation of federal statutes and regulations stitched together by an erroneous application of the preemption doctrine. CSX attempts to mix elements of two separate legislative acts in order to argue that the field of grade crossing safety has been covered. However, because Congress has included within the FRSA an express preemption provision, it is not appropriate "to infer congressional intent . . . from the substantive provisions" of the federal-aid scheme. *Cipollone, supra* at 2618. Similarly, there is no authority for CSX's resort to regulations governing federal-aid under the FRSA as a basis for preemption of state law under 45 U.S.C.A. § 434.

Both Congress and the Executive Branch agencies are capable of speaking with drastic clarity whenever they choose to assert their full federal authority and preempt state law. *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767, 780 (1947); *Hillsborough, supra* at 718. If Congress and the Secretary of Transportation intended to utilize the FRSA in conjunction with the federal-aid statutes to abolish state tort liability at grade crossings, and substitute in its place a system of funding prioritization wherein the states, and not the railroads, have sole responsibility, the Secretary and Congress could have so stated in unmistakable terms. The absence of any such expression by the Secretary or Congress plainly demonstrates that this was not the result intended, particularly where Congress has provided no alternative remedy for injury. Given the special concern for grade crossing safety evidenced by Congress in the FRSA, *see* 45 U.S.C.A. § 433, it exceeds the bounds of credibility to "believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (Blackmun, J., dissenting).

C. Common Law Actions For Damages Are Preserved Under The Local Hazards Exception of 45 U.S.C.A. § 434.

Regardless of whether the Secretary, acting through the FRA, has promulgated regulations addressing the same subject matter as the legal duty underlying state tort law, the fact remains that states are still permitted to extend their common law to railroad operations at grade crossings under the local hazards exception to 45 U.S.C.A. § 434. This exception permits states to regulate rail safety even where the Secretary of Transportation acts with the intent to preempt the subject matter of state laws and regulations.⁷

For purposes of section 434, a local safety hazard is a hazard which: 1) is not statewide in character, and 2) is not capable of being adequately encompassed in Uniform National Standards. *National Association of Regulatory Commissioners v. Coleman*, 542 F.2d 11 (3rd Cir. 1976).

Under this criteria, railroad-highway grade crossings are local hazards by their very nature. They are confined to a circumscribed area and are not capable of being adequately encompassed by any national standards. Numerous factors such as area population, gross tonnage of traffic, frequency of use, slope, angle of intercept, surrounding vegetation or

⁷ *Amicus curiae* Association of American Railroads ("AAR") argues for a very narrow construction of the local safety hazards exception. Significantly, during congressional hearings on the FRSA the AAR urged the House Subcommittee on Transportation and Aeronautics to adopt a much narrower exception encompassing only "unique hazards of local origin." *See Subcommittee Hearings* at 84 (statement of Thomas M. Goodfellow, President, AAR), & 115 (Statement of Paul Rogers, General Counsel National Association of Railroad Utility Commissioners). This language was rejected by Congress as too restrictive. It would appear that the AAR is now attempting to achieve through this Court what it could not accomplish through its input into the legislative process.

development, sight distance, number of traffic lanes, and permissible automobile and train speeds may contribute to the ultra-hazardous nature of a particular grade crossing. The sheer number of these variables renders uniform national standards impractical. The MUTCD itself recognizes this:

Due to the large number of significant variables which must be considered there is no single standard system of active traffic control devices universally applicable for grade crossings.

MUTCD at § 8D-1.

Congress included the local hazards exception within 45 U.S.C.A. § 434 to enable the states to respond to local situations not capable of being adequately encompassed within uniform national standards. *See* HOUSE REPORT NO. at 4117. Imposing a duty of reasonable care on railroads constitutes the only method by which a state may realistically attempt to address a problem which can manifest itself in so many diverse forms. Because the common law narrowly tailors the duties imposed upon a railroad to what is reasonable and prudent under the circumstances, such duties are truly local in nature and do not constitute "statewide standards superimposed upon national standards covering the same subject matter." HOUSE REPORT at 4117.

The Court of Appeals below dismissed the application of the local hazards exception as irrelevant because "a state does not legislate a duty of care in order to eliminate a local safety hazard." *Easterwood*, 933 F.2d at 1553 n.3. This rejection not only ignores the plain text of the FRSA, but is fundamentally inconsistent with the remainder of the opinion.

The Eleventh Circuit failed to distinguish between the positive enactments of state legislatures and the incidental effects of tort liability for purposes of preemption under §434. In the view of the Court of Appeals, "state law"

includes common law as well as enacted statutes. *Id.* at 1552 n.2, citing *San Diego Bldg. and Trades Council v. Garmon*, 359 U.S. 236 (1959). However, the Court gave no reason why state law encompasses common-law damage suits for purposes of § 434, but not under the local hazard exception. Amici suggest that there is no valid basis for this distinction.

Under this Court's opinion in *Cipollone, supra*, it is clear that the express provisions of § 434 must govern the extent to which state law is preempted. Because § 434 explicitly permits states to regulate local safety hazards, even after the Secretary has acted with respect to the particular subject matter, the preemption arguments of CSX should be rejected as contrary to the express language of the FRSA.

III. STATE COMMON-LAW CLAIMS BASED UPON NEGLIGENT OPERATION OF LOCOMOTIVES AT UNREASONABLE SPEEDS ARE NOT PREEMPTED BY FRSA.

Locomotive speed constitutes an integral element of grade crossing safety. Where a crossing is equipped with only a passive warning device (one not activated by the approach of a train, such as automatic gates and flashing lights), a roadway user must have sufficient "sight distance" to detect an approaching train and determine the appropriate response. Adequate sight distance permits the roadway user to see an approaching train in a sight line that will either allow the vehicle to pass through the grade crossing prior to the arrival of the train, or come to a safe stop prior to encroachment into the crossing area. The greater the speed of an approaching train, the greater the sight distance required to afford a motorist sufficient time to see the train and decide upon an appropriate course of action. *See* RAIL-HIGHWAY CROSSING STUDY (1989) at 5-7; RAILROAD-HIGHWAY GRADE CROSSING HANDBOOK, Federal Highway Administration, U.S. Dept. of Transportation 131-32 (Second Ed. 1986).

The federal government has never directly regulated locomotive speeds. Rather, maximum permissible train speed is set by the railroads solely as a function of the physical characteristics of the track. FRA regulations set forth six classes of railroad track and assign maximum operating speeds for each class of track based upon whether a train carries passengers or freight. 49 C.F.R. § 213.9. Track class, in turn, is determined only by such physical characteristics as ballast, geometry, track surface, gage, alinement, numbers of crossties, rail joints, and tie plates. See "Track Safety Standards" at 49 C.F.R. § 213 *et seq.*

Since the railroad determines the class of track to provide, it is the railroad alone which determines how fast their trains will travel over a given stretch of track. If a railroad desires to increase train speeds, it need only upgrade the physical characteristics of the track to a higher class.

Based upon the track class/speed regulations at § 213.9, CSX argues that the Secretary of Transportation has covered the subject matter of train speed and that state tort suits for failing to exercise reasonable care with regard to train speed are preempted under 45 U.S.C.A. § 434. Moreover, CSX argues that the Secretary specifically took grade crossing safety into account when setting the track class/speed regulations under § 213.9, so that tort liability under state law would conflict with a federal crossing scheme.

The Court of Appeals below agreed with CSX and rejected Mrs. Easterwood's arguments that the regulations at § 213.9 were only addressed to the physical condition of the track. According to the Eleventh Circuit:

. . . Easterwood does not point to any legislative history for the speed limits and therefore she asks us to guess at the motives of the Secretary of the Treasury [sic]. Such guessing is inherently suspect. While

Easterwood assumes the speed limits are designed to prevent derailments, it is equally valid to assume that the speed limits were set low enough that, in conjunction with adequate grade crossing signals and gates, the speed limits were intended to lessen the number of grade crossing accidents as well as lessen the chances of derailment.

Easterwood, 933 F.2d at 1554.

This analysis errs in several respects. First, the lower court found it "valid to assume" that the Secretary had coordinated national rail speed limits with adequate grade crossing warning devices and, absent a demonstration by Mrs. Easterwood to the contrary, preempted her cause of action. *Id.* This inappropriately reverses the well-settled presumption against preemption. Amici suggest that CSX bears the burden of demonstrating that Congress intended to preempt common law tort actions, and that the Secretary covered the subject of locomotive speed in a manner which encompassed reasonable speeds at grade crossings. The absence of such a showing compels the preservation of Mrs. Easterwood's tort claim.

The notion advanced by CSX and the Eleventh Circuit that the Secretary (FRA) took grade crossing safety into account in setting rail speed ignores the very text of the regulations at issue. The preface to 49 C.F.R. part 213, entitled "Scope of the Part", states:

This part prescribes *initial minimum safety requirements* for railroad track that is part of the general railroad system of transportation. The requirements prescribed in this part apply to specific track conditions existing in isolation. Therefore, a combination of track conditions, none of which individually amounts to a deviation from the requirements

of this part, *may require remedial action to provide for safe operation over that track.*

49 C.F.R. § 213.1 (emphasis added). The FRA clearly did not address itself to sight distance or grade crossing safety because it promulgated regulations which only address physical track conditions existing in isolation.

In addition to the plain language of § 213.1, the prefatory comments of the FRA in the Federal Register preceding the 1971 publication of 49 C.F.R. Part 213 reveal that "a series of variable factors such as population density near track, gross tonnage of traffic, frequency of use, and passenger operations" were *not* considered by the FRA, but were left to future regulations. 36 Fed. Reg. 20336 (1971).⁸

The regulations at 49 C.F.R. § 213 *et seq.* merely set forth technical standards for trackage. Accordingly, federal preemption under 45 U.S.C.A. § 434 only prohibits the adoption of differing or conflicting technical standards under state law. Thus for example, the fact that the FRA requires a minimum of 12 non-defective crossties for each 39 feet of track under 49 C.F.R. § 213.109 means that a state cannot require a greater or lesser number of ties. Similarly, a state could not develop its own track class definitions and assign rail speeds differing from those in § 213.9. However, nothing within these federal regulations prohibit the states from imposing liability under common law tort principles

⁸ FRA safety inspectors and railroad engineers frequently testify as experts in pending tort actions involving these issues that grade crossing safety is not considered when railroads set train speeds. *Amici ATLA and TLPJ* have lodged with the Clerk of the Court the depositions of Larry Chamberlain (Manager of Engineering Maintenance for Union Pacific Railroad) and Wallace Holl (retired FRA safety inspector) in the case of *Edwards v. Union Pacific Railroad Systems*, No. CJ-90-8195 (D.Okla. 1991) for the Court's reference and convenience. See Chamberlain deposition taken August 27, 1991, at pp. 7-36; Holl deposition taken December 10, 1991, at pp. 11-22.

Permitting tort liability to be imposed under state law does not interfere with the minimum track safety standards under 49 C.F.R. § 213 *et seq.* If a railroad operates its trains at speeds which are unreasonable and dangerous under local conditions, requiring the railroad to compensate a tort victim through an award of damages would not require the railroad to take any actions which differ from those imposed by federal regulations. Such damage awards would merely provide a financial incentive for the railroad to slow its trains down to speeds which are reasonable and prudent. This result, in turn, does not interfere with the national uniformity of track safety standards as established by the FRA, and ultimately advances rail safety.

Preempting state tort liability based upon excessive speed would immunize railroads from any consequences of their tortious behavior. Because railroads determine what class of track will be built, the only limits on train speeds would be the willingness of the railroads to provide for physical track quality. The hazards of such a scheme were recognized by the Eleventh Circuit in *Mahoney v. CSX Transportation, Inc.*, 966 F.2d 644 (11th Cir. 1992):

Suppose the train that struck Mahoney was traveling at 59 miles per hour, at night, in a dense fog, and during stiff rain. If 60 miles per hour was allowed by federal law, CSX could not be sued for negligently excessive speed, even though the train's speed under these circumstances might be clearly unreasonable. ... Ordinarily, "compliance with a legislative enactment ... [should] not prevent a finding of negligence where a reasonable [person] would [have taken] additional precautions." *Restatement (Second) of Torts* §288C (1965).

966 F.2d at 646-647 (Birch, J., concurring).

Similarly, a railroad willing to provide for class six track could run its trains through high volume urban grade crossings at 110 miles per hour irrespective of crossing signalization or sight distance. Such results were never intended by Congress. The practical result would be an increase in the deaths, injuries and property damage from railroad accidents which the FRSA was enacted to remedy.

As in the case with grade crossing signalization, even if the Secretary of Transportation intended the regulations at § 213.9 to cover the subject matter of safe train speeds at grade crossings, and even if the 45 U.S.C.A. § 434 could plausibly be read to preempt common law damage actions, states could still apply their common law through the local safety hazards exception. The numerous factors which necessarily affect sight distance render national speed limits impossible.

CSX cites an extensive list of cases rejecting application of the local safety hazard exception to claims based on train speed. Brief of Petitioner at n.22. However, these cases based their rejection of the local safety hazard exception on the fact that the language of 45 U.S.C.A. § 434 only refers to the "states" and not political subdivisions. In light of this Court's recent decision that a grant of regulatory authority to the states cannot be read to exclude similar authority in local political subdivisions because such subdivisions are "components of the very entity the statute empowers," these cases do not represent good law. *Wisconsin Public Intervenor v. Mortier*, 111 S.Ct 2476, 2478 (1991).

Moreover, Congress itself has recognized the authority of state and local governments to regulate train speeds. See 45 U.S.C.A. § 656 (employing the phrase "local safety hazard" with respect to speed limits enacted by state and local governments). Where local conditions render a railroad's chosen speed hazardous to the population, a state may not only enforce positive enactments such as speed limits, but may also impose a common-law duty of reasonable care.

If Congress or the Secretary of Transportation had intended to give railroads *carte blanche* to operate at any speed without regard to safety, one would expect some indication in either the legislative history of the FRSA or the FRA comments preceding 49 C.F.R. § 213. There is none. The presumption against the preemption of state law compels the conclusion that states may hold railroads liable for the failure to exercise reasonable care with regard to train speeds.

CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals in No. 91-790 should be affirmed and the judgment in No. 91-1206 should be reversed.

Respectfully Submitted,

Dale Haralson, Esq.*
Adam Levine, Esq.
HARALSON, KINERK & MOREY
28 South Stone Avenue
Tucson, Arizona 85701
(602) 792-4330
Attorneys for Amici Curiae
**Counsel of Record*

Roxanne Barton Conlin, Esq.
Jeffrey Robert White, Esq.
Association of Trial Lawyers of America
1050 31st St., N.W.
Washington, DC 20007
(202) 965-3500

Priscilla Budeiri, Esq.
Arthur H. Bryant, Esq.
Trial Lawyers for Public Justice, P.C.
1625 Massachusetts Ave., N.W.
Washington, DC 20036
(202) 797-8600

October 13, 1992

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IN THE
Supreme Court of the United States DE THE CLERK

OCTOBER TERM, 1992

CSX TRANSPORTATION, INC.,
Petitioner,
v.

LIZZIE BEATRICE EASTERWOOD,
Respondent.

LIZZIE BEATRICE EASTERWOOD,
Cross-Petitioner,
v.

CSX TRANSPORTATION, INC.,
Cross-Respondent.

On Writs of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF OF THE
NATIONAL CONFERENCE OF STATE LEGISLATURES,
COUNCIL OF STATE GOVERNMENTS, NATIONAL
LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS,
NATIONAL GOVERNORS' ASSOCIATION, NATIONAL
INSTITUTE OF MUNICIPAL LAW OFFICERS,
INTERNATIONAL CITY/COUNTY MANAGEMENT
ASSOCIATION, AND NATIONAL ASSOCIATION OF
COUNTIES AS AMICI CURIAE
IN SUPPORT OF RESPONDENT/CROSS-PETITIONER

ROBERT L. NELSON
JAMES G. GIBNEY, LAURENCE
J. BENTIN
1100 M Street, N.W.
Washington, D.C. 20007
(202) 462-2400

RICHARD RUDA *
Chief Counsel
JAMES E. CROWLEY
STATE & LOCAL LEGAL CENTER
616 North Capitol St., N.W.
Suite 204
Washington, D.C. 20001
(202) 462-4100

* Counsel retained for the

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether state tort remedies for violation of a railroad's duty of care to provide adequate safety devices at grade crossings are preempted by the Federal Railroad Safety Act.
2. Whether state tort remedies for operating a train at an excessive rate of speed are preempted by the Federal Railroad Safety Act.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
INTEREST OF THE <i>AMICI CURIAE</i>	1
STATEMENT OF THE CASE	2
INTRODUCTION AND SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. THE FEDERAL RAILROAD SAFETY ACT'S PREEMPTION PROVISION MUST BE NARROWLY CONSTRUED	5
A. Railroad and Highway Safety Issues Are Matters Within the States' Traditional Police Powers, and There Is a Strong Pre- sumption Against Preemption in this Area..	5
B. Section 434 Expressly Preserves State Law, and Its Preemptive Effect Is Very Narrow..	8
II. STATE TORT REMEDIES FOR VIOLATION OF A RAILROAD'S DUTY OF CARE WITH RESPECT TO SAFETY DEVICES AT GRADE CROSSINGS ARE NOT PREEMPTED UN- DER SECTION 434	10
A. The Secretary Has Not Acted with Respect to the Subject Matter of Warning Devices at Grade Crossings Not Improved with Fed- eral Funds	10
B. State Law Tort Actions Against Railroads for Breach of a Duty of Care with Respect to Safety Devices at Crossings Improved with Federal Funds Are Not Preempted.....	17

TABLE OF CONTENTS—Continued

	Page
III. A STATE LAW TORT ACTION BASED ON A TRAIN'S EXCESSIVE SPEED IN APPROACHING A GRADE CROSSING IS NOT PREEMPTED	22
A. The Secretary's Train Speed Regulations Do Not Address the Same Subject Matter as the State Tort Action	22
B. The Federal Regulations Do Not Reflect a Judgment that Trains Should Not Moderate Their Speed to Enhance Crossing Safety....	26
IV. STATE TORT REMEDIES FOR BREACH OF A RAILROAD'S DUTY OF CARE WITH RESPECT TO CROSSING SAFETY OR TRAIN SPEED ARE NOT PREEMPTED BECAUSE THEY ADDRESS ESSENTIALLY LOCAL SAFETY HAZARDS	29
CONCLUSION	30

TABLE OF AUTHORITIES

Cases:	Page
<i>Atlanta & W.P. R.R. v. Wyly</i> , 65 Ga. 120 (1880) ..	5
<i>Atlantic Coast Line R.R. v. Pidd</i> , 197 F.2d 153 (5th Cir.), cert. denied, 344 U.S. 874 (1952) ..	6
<i>Burlington Northern R.R. Co. v. Montana</i> , 880 F.2d 1104 (9th Cir. 1989) ..	24
<i>California v. ARC America Corp.</i> , 490 U.S. 93 (1989) ..	6
<i>California v. Zook</i> , 336 U.S. 725 (1949) ..	6
<i>Central of Ga. Ry. v. Bond</i> , 111 Ga. 13 (1900) ..	5
<i>Central of Ga. Ry. v. Wooten</i> , 295 S.E. 2d 369 (Ga. App. 1982) ..	5
<i>Chicago, B. & Q. R.R. v. King</i> , 337 F.2d 510 (8th Cir. 1964) ..	6
<i>Cipollone v. Liggett Group, Inc.</i> , 112 S.Ct. 2608 (1992) ..	passim
<i>Florida Lime & Avocado Growers, Inc. v. Paul</i> , 373 U.S. 132 (1963) ..	25
<i>Gade v. National Solid Wastes Mgmt. Ass'n</i> , 112 S.Ct. 2374 (1992) ..	25
<i>Hillsborough County v. Automated Medical Laboratories</i> , 471 U.S. 707 (1985) ..	6
<i>Jones v. Rath Packing Co.</i> , 430 U.S. 519 (1977) ..	6
<i>Linfield v. Old Colony R.R.</i> , 64 Mass. (10 Cush.) 562 (1852) ..	5
<i>Metropolitan Life Ins. Co. v. Massachusetts</i> , 471 U.S. 724 (1985) ..	6, 9
<i>Morales v. Trans World Airlines, Inc.</i> , 112 S.Ct. 2031 (1992) ..	8
<i>New York v. United States</i> , 112 S.Ct. 2408 (1992) ..	16
<i>Pennhurst State School & Hosp. v. Halderman</i> , 451 U.S. 1 (1981) ..	1-2, 19
<i>Pennsylvania R.R. v. Miller</i> , 99 F. 529 (3d Cir. 1900) ..	5-6
<i>Railway Express Agency v. New York</i> , 336 U.S. 106 (1949) ..	5
<i>Raymond Motor Transp., Inc. v. Rice</i> , 434 U.S. 429 (1978) ..	5
<i>Rice v. Santa Fe Elevator Corp.</i> , 331 U.S. 218 (1947) ..	1, 6

TABLE OF AUTHORITIES—Continued

	Page
<i>Seaboard Coast Line R.R. v. Wallace</i> , 181 S.E. 2d 542 (Ga. App. 1971)	5
<i>Shaw v. Delta Air Lines, Inc.</i> , 463 U.S. 85 (1983) ..	8
<i>Southern Ry. v. Georgia Kraft Co.</i> , 373 S.E.2d 774 (Ga. App. 1988)	17
<i>Sproles v. Binford</i> , 286 U.S. 374 (1932)	5
<i>Terminal Railroad Ass'n v. Brotherhood of Railroad Trainmen</i> , 318 U.S. 1 (1943)	5
<i>Statutes and Regulations:</i>	
15 U.S.C. § 1392 (d)	24
23 U.S.C. § 409	13
45 U.S.C. § 434	passim
23 C.F.R. Part 646, Subpart B	18, 19
§ 646.200	11, 18, 19
§ 646.210	11
§ 646.214 (b)	passim
§ 655.603 (a)	14
§ 924.1	12
§ 1204.4	12
49 C.F.R. Chapter II	10
§ 213.1	23
§ 213.9	22, 23, 26, 28
§ 213.51-143	22
<i>Legislative Materials:</i>	
115 Cong. Rec. 40202-07 (Dec. 19, 1969)	20, 30
116 Cong. Rec. 27610-21 (Aug. 6, 1970)	20, 30
H.R. Rep. No. 1194, 91st Cong., 2d Sess., reprinted in 1970 U.S. Code Cong. & Admin. News 4104	9, 24, 29-30
<i>Other Authorities:</i>	
74 C.J.S. <i>Railroads</i> (1951 & Supp. 1992)	1, 6, 23
ABA Tort and Insurance Practice Section, <i>Issues in Railway Law: Limiting Carrier Liability and Litigating the Railroad Crossing Case</i> (1990)	6

TABLE OF AUTHORITIES—Continued

	Page
Association of American Railroads, <i>Compilation of States' Laws and Regulations on Matters Affecting Rail-Highway Crossings</i> (1983)	6
John L. Cable, <i>Rights & Responsibilities at Railway Grade Crossings</i> (1929)	6
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44 Fed. Reg. 52104 (Sep. 6, 1979)	23
47 Fed. Reg. 7275 (Feb. 18, 1982)	23
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Isaac F. Redfield, <i>A Practical Treatise Upon the Law of Railways</i> (2d ed. 1858)	1, 6
U.S. Dept. of Transportation, <i>Manual on Uniform Traffic Control Devices</i> (1988)	10, 11, 13, 27
U.S. Dept. of Transportation, <i>Rail-Highway Crossing Accident/Incident and Inventory Bulletin</i> , No. 13 (July 1991)	3
U.S. Dept. of Transportation, <i>Rail-Highway Crossings Study</i> (April 1989)	passim
U.S. Dept. of Transportation, <i>Railroad-Highway Safety, Part II: Recommendations for Resolving the Problem</i> (1972)	12

INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. This case presents issues concerning one of *amici's* core interests: the relationship between federal regulation and the historic exercise of traditional state police powers relating to safety and health.

Railroads have operated in the United States since 1830. State common law remedies for accidents at railroad-highway crossings came into existence soon thereafter, *see, e.g.*, Isaac F. Redfield, *A Practical Treatise Upon the Law of Railways* 393-96 (2d ed. 1858), and their development has continued unabated up to the present. *See, e.g.*, 3 Byron K. Elliott & William F. Elliott, *A Treatise on the Law of Railroads* 1735-1801 (1897); 74 C.J.S. *Railroads* §§ 710-62 (1951 & Supp. 1992). *Amici* submit that if Congress intends to preempt the exercise of state police power of this vintage and importance, it must—as this Court's cases require—do so with utmost explicitness. *E.g.*, *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2617 (1992); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The provision of the Federal Railroad Safety Act that addresses preemption, 45 U.S.C. § 434, falls far short of the requisite degree of clarity and specificity to preempt the tort remedies at issue in this action.

Amici have a further interest arising from the reliance of CSX and the Solicitor General on certain federal regulations that impose conditions on the expenditure of federal funds to support their preemption arguments. As the Court has instructed, if the federal government seeks to displace state law by conditioning a federal grant on the renunciation by the States of regulatory authority, the federal government must do so explicitly. *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). The displacement of state regulatory authority that occurs when States accept a federal grant is not properly re-

garded as "preemption" at all, but is rather a function of "whether the State voluntarily and knowingly accepts the terms" of what is, in effect, a "contract" whose terms must be "unambiguously" expressed by Congress if they are to displace state law. *Id.* Such clarity is plainly absent here.

Because of the importance of these questions to *amici* and their members, *amici* submit this brief to assist the Court in resolving the case.¹

STATEMENT OF THE CASE

On February 24, 1988, Thomas Easterwood was killed when a train operated by petitioner/cross-respondent CSX Transportation, Inc. ("CSX") struck his truck as he tried to drive over a grade crossing in Cartersville, Georgia. Respondent cross-petitioner Lizzie Beatrice Easterwood, Mr. Easterwood's widow, brought this action in the United States District Court for the District of Georgia seeking damages under Georgia law for her husband's death. Ms. Easterwood claimed that CSX's negligence was the proximate cause of her husband's death. She asserted, *inter alia*, that CSX had operated the train at a speed greater than was reasonable for the time and place of the accident, and that CSX had not provided adequate warning devices—specifically, automatic gates—at the crossing.

The district court held that both the excessive speed claim and the claim based on inadequacy of warning devices at the crossing were preempted under Section 434 of the Federal Railroad Safety Act (FRSA), 45 U.S.C. § 434. The Eleventh Circuit affirmed in part and reversed in part. With respect to the claim of excessive speed, the court agreed with the district court that federal regulations imposing maximum speed limits for particular classes of track preempted the subject matter of

¹ The parties' letters of consent to the filing of this brief have been filed with the Clerk pursuant to Rule 37.3 of the Rules of this Court.

train speed. But with regard to grade crossing safety devices, the court concluded that the Secretary of Transportation (Secretary) had not promulgated regulations that preempted state standards governing the selection of safety devices, at least where, as here, a crossing had not been upgraded as part of a federal grade crossing improvement project. In addition, the Eleventh Circuit ruled that other claims concerning the railroad's failure properly to maintain the grade crossing could proceed to trial.

By virtue of this Court's grant of both CSX's petition for certiorari and Ms. Easterwood's cross-petition, the Eleventh Circuit's rulings on the issues of crossing safety devices and train speed are now before the Court. The Eleventh Circuit's rulings for Ms. Easterwood with respect to other claims are, however, not before the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

Railroad grade crossing accidents have historically been, and continue to be, frequent and deadly. Between 1985 and 1990, accidents at public grade crossings in the United States averaged 5,885 per year, with resulting fatalities averaging 628 annually. *See* U.S. Dept. of Transportation, *Rail-Highway Crossing Accident/Incident and Inventory Bulletin*, No. 13, at 3 (July 1991). And while the number of accidents has declined somewhat in recent years, the 1980s saw an increase in the severity of railroad crossing accidents. As DOT has reported:

Though the number of accidents is declining, the number of fatalities is not keeping pace, as the average number of fatalities per crossing accident is increasing. Crossing figures show that fatal accidents, as a proportion of all accidents, have been increasing in number by more than one-tenth of a percent per year. More than 7 percent of all crossing accidents in 1986 and 1987 resulted in at least one fatality. A highway vehicle occupant is more than 11 times more likely to die in an accident involving a train than in other highway accidents. Rail-highway crossing accidents are already the most

severe kind of highway accident, and severity is increasing.

U.S. Dept. of Transportation, *Rail-Highway Crossings Study* 2-10 (April 1989).

Georgia, in common with other States, has historically addressed the problem of rail-highway accidents by providing a tort remedy for persons injured in such accidents as a result of a railroad's breach of its duty of care. Where a State acts in such a traditional area of its police power authority, this Court has recognized that there is a powerful presumption against preemption, and that assertedly preemptive federal statutes must be narrowly construed. *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2617 (1992).

The statute relied on for preemption here, 45 U.S.C. § 434, is expressly limited in scope. Indeed, the statute is plainly designed to *preserve*, not preempt, state authority, except where the Secretary has specifically regulated with respect to a particular subject matter.

Properly read in conformity both with the presumption against preemption and its own express limits, Section 434 does not preempt Ms. Easterwood's rights of action, for the Secretary has not regulated their subject matter. With respect to non-federally funded grade crossings, the Secretary has not regulated the subject matter of the selection of protective devices. Indeed, even with respect to federally funded grade crossings, the Secretary's regulations do not preempt the subject matter of a railroad's duty of care with respect to warning devices. Nor is Ms. Easterwood's train speed claim preempted. The Secretary's regulations do not address the subject matter of a railroad's duty to operate at a reasonable speed in light of prevailing local conditions, but only the more limited subject of maximum train speed for classes of track.

Finally, even if the Secretary's regulations are construed to cover the same subject matter as Ms. Easterwood's state law tort action, her rights of action are still

not preempted, as they fall within Section 434's savings clause for state standards that address "essentially local safety hazard[s]." The duties of care that Ms. Easterwood seeks to enforce intrinsically address themselves to peculiarly local conditions, and thus are not preempted under Section 434.

ARGUMENT

I. THE FEDERAL RAILROAD SAFETY ACT'S PRE-EMPTION PROVISION MUST BE NARROWLY CONSTRUED

A. Railroad and Highway Safety Issues Are Matters Within the States' Traditional Police Powers, and There Is a Strong Presumption Against Preemption in this Area

At issue in this case are matters of public safety involving rail and highway traffic—matters close to the heart of the States' historic police powers. *See, e.g., Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 443 (1978); *Railway Express Agency v. New York*, 336 U.S. 106, 109-11 (1949); *Terminal Railroad Ass'n v. Brotherhood of Railroad Trainmen*, 318 U.S. 1, 6-7 (1943); *Sproles v. Binford*, 286 U.S. 374, 388-89 (1932). Georgia has long chosen to exercise its police power by providing a right of action to persons injured as a result of a railroad's failure to exercise due care with respect to grade crossing safety or excessive train speed. *See, e.g., Atlanta & W.P.R.R. v. Wyly*, 65 Ga. 120 (1880); *Central of Ga. Ry. v. Bond*, 111 Ga. 13 (1900), *Seaboard Coast Line R.R. v. Wallace*, 181 S.E.2d 542 (Ga. App. 1971); *Central of Ga. Ry. v. Wooten*, 295 S.E.2d 369 (Ga. App. 1982). In this respect, the law of Georgia is in conformity with that of virtually all other States, which have, since the mid-19th century, provided tort remedies to persons injured through railroad negligence—including negligence in providing safety devices at grade crossings and in operating trains at unsafe speeds when approaching grade crossings.²

² *See, e.g., Linfield v. Old Colony R.R.*, 64 Mass. (10 Cush.) 562 (1852); *Pennsylvania R.R. v. Miller*, 99 F. 529 (3d Cir. 1900)

When a State exercises its traditional police powers to address a substantial issue of public safety, preemption by federal legislative or regulatory action is highly disfavored. Indeed, this Court has repeatedly emphasized that there is a “presumption that state or local regulation of matters related to health and safety is not invalidated under the Supremacy Clause.” *Hillsborough County v. Automated Medical Laboratories*, 471 U.S. 707, 715 (1985) (emphasis added); accord *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 725 (1985). The existence of a “long history of state common-law . . . remedies” adds weight to this presumption. *California v. ARC America Corp.*, 490 U.S. 93, 101 (1989); see also *California v. Zook*, 336 U.S. 725, 733-35 (1949). “Where, as here, the field which Congress is said to have pre-empted has been traditionally occupied by the States, . . . ‘we start with the assumption that the historic police powers of the States were not to be superseded . . . unless that was the clear and manifest purpose of Congress.’” *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). This Court most recently addressed these principles in *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2617 (1992), in which it reiterated “the strong presumption against pre-emption.” *Id.* at 2621.

(collecting state cases); *Atlantic Coast Line R.R. v. Pidd*, 197 F.2d 153 (5th Cir.) (applying Florida law), cert. denied, 344 U.S. 874 (1952); *Chicago, B. & Q.R.R. v. King*, 337 F.2d 510 (8th Cir. 1964) (applying Iowa law).

See generally Isaac F. Redfield, *A Practical Treatise Upon the Law of Railways* § 172 (2d ed. 1858); Christopher F. Patterson, *Railway Accident Law: The Liability of Railways for Injuries to the Person* 157-67 (1886); 3 Byron K. Elliott & William F. Elliott, *A Treatise on the Law of Railroads* 1735-1801 (1897); John L. Cable, *Rights & Responsibilities at Railway Grade Crossings* (1929); 74 C.J.S. *Railroads* §§ 710-62 (1951 & Supp. 1992); ABA Tort and Insurance Practice Section, *Issues in Railway Law: Limiting Carrier Liability and Litigating the Railroad Crossing Case* (1990). See also Association of American Railroads, *Compilation of States' Laws and Regulations on Matters Affecting Rail-Highway Crossings* (1983) (state-by-state compilation of statutes and regulations).

As *Cipollone* makes clear, the presumption against preemption has several corollaries. The first is that “[t]he purpose of Congress is the ultimate touchstone” of preemption analysis.” *Id.* at 2617 (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978) (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963))). It follows, therefore, that when Congress includes in legislation a provision that expressly addresses preemption, the preemptive effect of the legislation is limited by the express preemption provision, and resort to implied preemption doctrines is unwarranted:

When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a “reliable indicium of congressional intent with respect to state authority,” *Malone v. White Motor Corp.*, 435 U.S., at 505, “there is no need to infer congressional intent to pre-empt state laws from the substantive provisions” of the legislation. *California Federal Savings & Loan Assn. v. Guerra*, 479 U.S. 272, 282 (1987) (opinion of Marshall, J.). Such reasoning is a variant of the familiar principle of *expressio unius est exclusio alterius*: Congress’ enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.

Id. at 2618 (parallel citations omitted).

Further, *Cipollone* makes clear that when addressing an express preemption provision, the Court “must fairly but—in light of the strong presumption against preemption—narrowly construe [its] precise language.” *Id.* at 2621. Only where the language used by Congress reveals its manifest intention to preempt state law may a State’s exercise of its police powers be displaced, and then only to the degree specified by Congress.

B. Section 434 Expressly Preserves State Law, and Its Preemptive Effect Is Very Narrow

Given the foregoing principles, the starting point for preemption analysis in this case is, as CSX and its *amici* recognize, the express preemption provision of the Federal Railroad Safety Act (FRSA), 45 U.S.C. § 434. Analysis of Section 434 reveals that its preemptive effect is subject to significant, expressly stated limits—limits that CSX and its *amici* ignore or obfuscate.

Remarkably, CSX asserts that “Section 434 pre-empts ‘any law . . . relating to railroad safety,’” CSX Br. 23, and proceeds to argue as if the statute contained such a broad preemption provision. *Cf. Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031 (1992); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983). This argument is flatly contradicted by the statutory language. Section 434 does *not* preempt “any law relating to railroad safety.” On the contrary, it expressly preserves state law, providing in pertinent part:

The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary [of Transportation] has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement.

As this language makes clear, far from *preempting* “any law . . . relating to railroad safety,” Section 434 in fact provides that a State *may adopt (or retain) any law relating to railroad safety* unless and until the Secretary has enacted a regulation covering the subject matter of the state law.³ The legislative history confirms the plain meaning of the statutory language—that Section 434 was

³ CSX correctly points out that the terms “any law” and “relating to” are conspicuous for their breadth. CSX Br. 25. Ironically, however, what CSX thus demonstrates is not the breadth of the preemption accomplished by Section 434, but the breadth of the state regulation Section 434 *permits*.

intended *not* as a preemption provision of extraordinary breadth, but as an affirmation of state authority except where specifically displaced by federal regulation. As the House Report on the FRSA explains, Section 434 “*authorizes States to regulate in any area of railroad safety until the Secretary acts with respect to the particular subject matter.*” H.R. Rep. No. 1194, 91st Cong., 2d Sess., reprinted in 1970 U.S. Code Cong. & Admin. News 4104, 4112 (emphasis added).⁴

The carefully limited language of Section 434 and the general principle of narrow construction of preemptive statutory language are mutually reinforcing. Contrary to CSX’s contention, the result is not a preemption of state law far more sweeping than that accomplished by the statute at issue in *Cipollone*, CSX Br. 25, but rather a preemption that is at least as narrow and focused. As in *Cipollone*, state regulation must stand unless it is preempted under a fair but narrow reading of the statute—that is, under a reading that permits any state regulation of railroad safety unless the Secretary has enacted a regulation that addresses the particular subject matter of the state safety regulation.

⁴ CSX and its *amici* stress passages in the legislative history that indicate Congress desired greater uniformity in the regulation of railroad safety. But Congress’ expressed desire for uniformity “to the extent practicable,” 45 U.S.C. § 434, is necessarily limited by the terms of the statute Congress enacted. The statute (and the legislative history) make clear that Congress expressly accepted the possibility of nonuniform state regulation when it provided that any state regulation of railroad safety was permissible except when the Secretary had specifically regulated the same subject matter. Notwithstanding Congress’ abstract desire for uniformity, “dis-uniformities . . . are the inevitable result of the congressional decision to ‘save’ local . . . regulation.” *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 747 (1985). Moreover, CSX’s citations are out of context—for example, CSX’s cites to passages in the House Report that explain Congress’ reservations about allowing States to bring enforcement actions to impose penalties based on violations of federal safety standards (an issue not relevant here). See CSX Br. 7 (quoting H.R. Rep. No. 1194, 91st Cong., 2d Sess., reprinted in 1970 U.S. Code Cong. & Admin. News 4104, 4109).

II. STATE TORT REMEDIES FOR VIOLATION OF A RAILROAD'S DUTY OF CARE WITH RESPECT TO SAFETY DEVICES AT GRADE CROSSINGS ARE NOT PREEMPTED UNDER SECTION 434

A. The Secretary Has Not Acted with Respect to the Subject Matter of Warning Devices at Grade Crossings Not Improved with Federal Funds

CSX argues that Ms. Easterwood's tort action is preempted insofar as it seeks to impose liability on CSX for violation of a duty of care with respect to the selection and installation of warning devices at the grade crossing where her husband was killed.⁵ But CSX points to no regulation promulgated by the Secretary that addresses the particular subject matter of requirements for the selection of warning devices at grade crossings, such as this one, that have not been improved with federal funds.⁶

The reason for this failure is simple: there is no such regulation. Pursuant to the authority of the FRSA, the Secretary has promulgated hundreds of mandatory railroad safety regulations. *See generally* 49 C.F.R. Chapter II. But nowhere has the Secretary promulgated gener-

⁵ The specific claim that CSX argues is preempted is that automatic gates should have been installed at the crossing. Automatic gates are one form of active traffic control device for railroad grade crossings; others include warning bells and post-mounted or cantilevered flashing lights. *See* Dept. of Transportation, *Manual on Uniform Traffic Control Devices* 8D-1 (1988).

In this Court, CSX limits its preemption argument to Ms. Easterwood's warning device and excessive speed claims; CSX does not argue that Ms. Easterwood's other theories, which included claims that CSX had failed to maintain the crossing so as to present an unimpeded view and that there was a dangerous "hump" in the middle of the crossing, are preempted.

⁶ As the United States points out, CSX's failure to establish preemption with respect to the subject matter of warning devices at non-federally funded crossings dooms its preemption arguments in this case. *See* U.S. Br. 26-27. We address below the United States' further argument that in other cases involving federally funded crossings, an action similar to Ms. Easterwood's might be preempted. *See infra* at 17-22.

ally applicable standards dictating what warning devices (beyond crossbucks, signs, and pavement markings) are or are not required at grade crossings. Rather, the Secretary has recognized that "[d]ue to the large number of significant variables which must be considered there is no single standard system of active traffic control devices universally applicable for grade crossings." U.S. Dept. of Transportation, *Manual on Uniform Traffic Control Devices* ("MUTCD") 8D-1 (1988).

In its effort to find federal regulations to which it can attach preemptive weight, CSX is forced to invoke regulations that are plainly inapplicable and that do not remotely address the subject matter of the selection of warning devices at crossings that have not been upgraded with federal funds. Thus, CSX makes much of 23 C.F.R. § 646.214(b), which it contends addresses the selection of warning devices for grade crossings; but CSX overlooks that this regulation is by its terms applicable *only* to the implementation of *federally funded* grade crossing improvement projects. *See* 23 C.F.R. § 646.200. Similarly, CSX contends that 23 C.F.R. § 646.210 reflects the Secretary's judgment that the States may not take any action that would require railroads to contribute to the cost of improving grade crossing warning devices, and thus "effectively eliminate[s] the railroads' former duty to select appropriate warning devices." CSX Br. 33. But again, CSX inexcusably neglects to mention that this regulation applies only to federally funded grade crossing improvement projects, and does not in any way address the subject of duties and costs that may be imposed on railroads outside of federally funded projects.

In fact, the only relevance to this case of the regulation forbidding States to require railroads to share in the cost of federally funded projects is that it demonstrates that the Secretary did not believe that tort actions against railroads were preempted even with respect to federally funded grade crossings. In determining that railroads should not be charged for a share of federal crossing improvement projects because they were of no "net benefit"

to the railroads, the Secretary recognized that improved crossing conditions *would* benefit the railroads by minimizing accidents for which the railroads would be held liable—a clear recognition that tort actions were not preempted. The Secretary's ultimate determination that the projects were of no *net* benefit was based on the conclusion that this benefit would be offset by the increased costs the railroads would bear in maintaining upgraded safety devices. See U.S. Dept. of Transportation, *Railroad-Highway Safety, Part II: Recommendations for Resolving the Problem* 103-08 (1972).

Similarly unavailing is CSX's suggestion that regulations requiring the States to survey grade crossings and develop priorities for public funding of improvement projects somehow cover the same subject matter as the railroads' duty of care in selecting crossing safety devices. See CSX Br. 29-30 (citing 23 C.F.R. §§ 924.1 & 1204.4). The subject matter addressed by these regulations is nothing more than the allocation of the scarce public funds available for rail-highway safety improvements. These general requirements imposed on the States—as conditions for participation in federal highway funding programs—by no means address the subjects of required safety features at particular grade crossings or the railroad's duty of care with respect thereto.

Nor is there any legitimate basis for suggesting that in providing procedures that may lead to the allocation of public funds for the improvement of *some* grade crossings, the Secretary in some fashion impliedly relieved all other parties of responsibility for grade crossing improvements. Attaching such effect to the regulations would be contrary to the very narrow preemptive language of Section 434. Moreover, it would have perverse effects from the standpoint of the overall federal goal of improving rail-highway crossing safety: the implication of CSX's position is that merely by requiring the States to *study* steps that might be taken to improve crossing safety using public funds (which ultimately may

be limited or unavailable), the Secretary relieved the railroads of *any* further responsibility under state law with respect to grade crossing improvement.⁷

In its attempt to find preemptive federal regulation, CSX ultimately places inordinate weight on a single sentence in DOT's Manual on Uniform Traffic Control Devices: "The determination of need and selection of devices at a grade crossing is made by the public agency with jurisdictional authority." MUTCD 8A-1. According to CSX, this sentence has the force of federal regulation and, under Section 434, preempts state courts from imposing on railroads any responsibility for the selection of grade crossing devices. Although CSX concedes that the Manual does not provide substantive standards governing selection of grade crossing warning devices, CSX nonetheless contends that it allocates decisionmaking authority with respect to such devices to state and local public agencies to the exclusion of both railroads and state courts adjudicating tort actions.

Ascribing such extensive preemptive effect to a single, oblique sentence in the 500-page Manual is plainly unwarranted. The Manual is emphatically *not* a collection

⁷ That the regulations requiring States to study grade crossings with a view to developing priorities for public grade crossing improvement projects were *not* intended to have such preemptive effect is confirmed by 23 U.S.C. § 409, enacted in 1987, which provides in pertinent part that "[n]otwithstanding any other provision of law, reports, surveys, schedules, lists or data compiled for the purpose of identifying, evaluating, or planning the safety enhancement of . . . railway-highway crossings, pursuant to sections 130, 144, and 152 of this title . . . shall not be admitted into evidence in Federal or State court or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data." Of course, if the regulations requiring the States to survey grade crossings for possible improvement already broadly preempted tort actions against railroads based on breach of their duty of care with respect to crossing safety, this statute would be superfluous. The statute thus provides a clear indication that Congress did not believe that these regulations covered the same subject matter as (and thus preempted) state law tort actions.

of procedural standards dictating the allocation of state decisionmaking authority. Rather, it is an extensive collection of technical standards governing the design and placement of traffic control signs, markings, and devices, including, *inter alia*, signs and devices used at railroad crossings.⁸ To the extent that the Manual has the force of regulation, it is by virtue of 23 C.F.R. § 655.603(a), which provides that “[t]he MUTCD approved by the Federal Highway Administrator is the national standard for all traffic control devices installed on any street, highway, or bicycle trail open to public travel in accordance with 23 U.S.C. 109(d) and 402(a)” (emphasis added).⁹ Notably, this regulation does *not* provide that every sentence in the Manual, no matter what its subject, has the force of law. Rather, it simply states that the specifications in the Manual provide the standard for *traffic control devices*. There is no suggestion that descriptive statements in the Manual concerning the allocation of state decisionmaking authority are to be transformed into prescriptive regulations with the force of law.

It is therefore evident that the statement relied upon by CSX is, at most, a truism—the MUTCD’s authors’ description of generally prevailing state administrative practices. It is not a regulation that, by virtue of Section 434, preempts any principle of state law imposing a duty of care on a railroad with respect to the selection of appropriate crossing safety devices (or empowering

⁸ It bears emphasizing again that with respect to railroad crossing devices, the Manual does not purport to state when any particular safety marking or device (beyond crossbucks, signs and pavement markings) must be used; it merely describes the specifications particular devices must meet when they are selected.

⁹ Similarly, 23 C.F.R. § 646.214(b)(1) provides that, with respect to federally funded grade crossing improvement projects, “[a]ll traffic control devices proposed shall comply with the latest edition of the Manual on Uniform Traffic Control Devices for Streets and Highways” Ironically, § 646.214(b)(1) also recognizes that the Manual is subject to “supplement[ation] to the extent applicable by State standards”—a further indication of the invalidity of using the Manual as a basis for wholesale preemption of state law.

a State’s common-law courts to enforce that duty). Ascribing broad preemptive effect to such an isolated and ambiguous sentence would be directly at odds with the presumption against preemption recognized in *Cipollone* and its precedential forebears.¹⁰

Moreover, it is abundantly clear that the Secretary never intended the Manual to have such broadly preemptive effect. The Secretary’s 1989 Report to Congress makes clear that the Secretary believed not only that state common-law tort actions based upon grade crossing design were not preempted, but that railroads were increasingly subject to such actions. Thus, the Secretary informed Congress that:

Accident liability costs are a significant and escalating concern. Although precise information is both sensitive and scattered, the railroads alone may be incurring litigation costs of more than \$100 million annually arising from train-motor vehicle accidents at crossings.

U.S. Dept. of Transportation, *Rail-Highway Crossings Study*, at 4 (April 1989). More significantly, the Secretary emphasized that “[i]n most cases, the courts still hold the railroad responsible for crossing accidents.” *Id.* at 3-1. The Secretary added that “[t]his ‘joint responsibility’ [between railroads and government bodies] is not necessarily a wrong concept at rail-highway crossings,” *id.*—an observation that would make no sense if, as the railroads argue, the MUTCD had in fact transferred sole responsibility for crossing safety devices from railroads to government agencies.

Indeed, far from suggesting that the railroads’ escalating tort liability should have been largely preempted

¹⁰ The notion that the MUTCD establishes that state and local government agencies have sole decisionmaking authority with respect to crossing safety devices is also contradicted by the Secretary’s regulations governing federally funded crossing improvements. These regulations make clear that even in federally funded projects, the determination of the appropriate safety devices may in some circumstances be made by the railroad. 23 C.F.R. § 646.214(b)(4).

by the MUTCD, the Secretary concluded that “[f]rom a future program standpoint, liability costs can best be addressed and, it is hoped, reduced through improved levels of devices at crossings” *Id.* at 7-6. Of course, if, as CSX argues, any railroad liability based on inadequate crossing safety devices were *already preempted*, no further improvements should be needed to reduce railroad liability. Instead, all that would be necessary would be for the courts to give preemptive effect to the Manual. The Secretary’s failure even to mention this possibility confirms the obvious: the Manual was never intended to constitute a regulation that would preempt the entire subject matter of railroad responsibility for grade crossing safety devices.

Finally, construing the MUTCD as a mandatory regulation providing that only state or local government agencies may make decisions concerning the adequacy of crossing safety devices, and that States may not empower their courts to consider such questions in adjudicating tort actions against railroads, would raise substantial constitutional questions under the Tenth Amendment. Only last Term, in *New York v. United States*, 112 S. Ct. 2408 (1992), this Court held that the federal government may not interfere with the internal allocation of state governmental authority by compelling States either to exercise regulatory authority, or to exercise it in a particular way. As the Court observed, “the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress’ instructions.” *Id.* at 2421.

Here, CSX proposes a construction of the MUTCD as a federal directive—applicable even outside the confines of federal funding programs—that the States exert their police power with respect to railroad crossing safety *only* through direct regulation, and not through common-law tort actions. Such interference in the State’s allocation of decisionmaking authority clearly would run afoul of the principles animating *New York v. United States*. The existence of such a substantial constitutional objection to

CSX’s position underscores the incorrectness of the construction it proposes.

Thus, not only has the Secretary promulgated no substantive regulations that address the subject matter of the selection of gate crossing safety devices for crossings not improved using federal funds, there is also no basis whatsoever for the suggestion that the Secretary has issued a regulation that requires that such devices be selected solely by government bodies or that otherwise precludes the States from imposing a duty of care on the railroads with respect to selection of such devices. Section 434 therefore does not preempt Ms. Easterwood’s tort remedy against CSX if it violated its duty of care. On the contrary, the statute expressly permits state regulation of the subject matter of Ms. Easterwood’s lawsuit.¹¹

B. State Law Tort Actions Against Railroads for Breach of a Duty of Care with Respect to Safety Devices at Crossings Improved with Federal Funds Are Not Preempted

Amicus curiae United States agrees that Ms. Easterwood’s tort action against CSX is not preempted to the extent that it is based upon an alleged breach of CSX’s duty of care with respect to the installation of safety devices at the crossing where Mr. Easterwood was killed. But the United States asserts that a similar action might

¹¹ As the MUTCD recognizes, railroads may often be required, as a matter of state law, to obtain government approval of installation of crossing devices. But the need for government approval by no means relieves the railroads of their own duty of care, under the traditional concept of joint responsibility for grade crossings, to initiate safety improvements where necessary. See, e.g., *Southern Ry. v. Georgia Kraft Co.*, 373 S.E.2d 774 (Ga. App. 1988); see also U.S. Br. at 17 n.14. It would, of course, be unfair to hold a railroad liable if it had attempted to correct a safety condition and been prevented from doing so by a state or local government agency. It does not appear from the record, however, that that occurred here. In any event, the issue that would be posed by such a situation would not be a preemption issue, but solely an issue of state tort and administrative law.

be preempted had the crossing been constructed or improved with federal funds.¹² This issue, as the United States appears to recognize (*see* U.S. Br. 26-27), is not presented on the facts of this case, and therefore is not properly before the Court. Moreover, the United States' assertion that there would be preemption in the context of a crossing improved with federal funds ignores the very different functions of the federal regulations governing federal funding of crossing improvements and the state law duty of care placed on the railroad.

The United States rests its argument on the provisions of 23 C.F.R. Part 646, Subpart B, the regulations that "prescribe policies and procedures for advancing Federal-aid projects involving railroad facilities." 23 C.F.R. § 646.200. More specifically, the United States relies on 23 C.F.R. § 646.214(b)(3), which sets forth criteria regarding appropriate warning devices for use in federally funded projects. According to the United States, the "subject matter" of this regulation is the selection of warning devices for federally funded grade crossing projects; thus, the United States argues, any state law that would impose a duty of care on a railroad with respect to the selection of warning devices must be preempted insofar as it would apply to a grade crossing that had been the subject of a federally funded project.

This argument, like the arguments advanced by CSX, is flawed in its overly broad characterization of the "subject matter" of the federal funding regulations. A fair

¹² Even with respect to grade crossings improved with federal funds, the United States concedes that a State could provide a right of action against a railroad based upon the railroad's violation of federal standards. *See* U.S. Br. 24 n.26. CSX, it should be noted, also seems to agree that the States are not precluded from providing a right of action for damages resulting from violation of applicable federal standards. *See* CSX Br. 21-22 n.9. The United States also concedes that a railroad could be held liable for breach of a duty of care in light of changed conditions postdating completion of a federally funded grade crossing project. U.S. Br. 24 n.26.

but appropriately narrow way of understanding the concept of the "subject matter" of federal and state regulations under Section 434 is to focus on the functions performed by the regulations. Such an analysis demonstrates that the "subject matter" of the regulations at 23 C.F.R. Part 646 Subpart B is the appropriate usage of limited federal funds in the implementation of grade crossing improvement projects.¹³ As the Secretary has explained, "[t]he Federal role in crossing improvement programs is one of overseer to ensure that Federal dollars are appropriately spent." U.S. Dept. of Transportation, *Rail-Highway Crossings Study 3-2* (April 1989). The Secretary's regulations, including 23 C.F.R. § 646.214, simply carry out that role by setting the conditions on the federal grant of funds for rail crossing improvements.

The United States ignores basic principles of federalism in casually failing to recognize that regulations implementing a federal grant program must be treated differently from direct federal regulation. Standards attached as conditions to federal spending programs are not free-standing sources of law, but are "in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Pennhurst State School v. Halderman*, 451 U.S. 1, 17 (1981). Such conditions have the effect of displacing state law only when Congress clearly and unambiguously so states. *Id.* Here, the regulations simply require the States to provide certain safety devices in accordance with stated criteria when a crossing project is carried out with federal funds. There is no clear statement that a further

¹³ CSX itself concedes that such a functional approach to the definition of the "subject matter" of a regulation is appropriate under Section 434, for CSX recognizes that the "subject matter" of the Secretary's enforcement regulations is distinct from the "subject matter" of state tort remedies that serve the function of compensating victims of accidents. CSX Br. at 21-22 n.9. Similarly, the function of the federal regulations at 23 C.F.R. § 646.200 *et seq.* is the regulation of federal spending, while the function of a state law duty enforced in a tort action against the railroad is to ensure that the railroad exercises due care in its operations.

condition is the displacement of state tort law. To treat these regulations as establishing, in effect, legally operative ceilings on any additional duty of care a State may demand of its railroads would not only violate the *Pennhurst* clear statement principle, but would also ascribe to the regulations a "subject matter" for purposes of Section 434's preemption analysis that they neither expressly or implicitly address.

Moreover, attributing preemptive force to the regulations governing expenditures on federally funded crossing improvement projects would ignore decades of history indicating that federal financial assistance to the States for railroad-highway safety projects has never been intended to preempt the States from enforcing railroads' own duty of care under the prevailing system of joint private and governmental responsibility for railroad safety. Federal financial assistance to railroad crossing safety projects dates back at least to 1916, and has increased steadily since then. *See generally* U.S. Dept. of Transportation, *Rail-Highway Crossings Study* 1-8-1-9 (April 1989). The provision of such federal funding had never been thought to alter the prevailing legal regime of shared public-private responsibility for rail crossing safety, which included tort remedies when railroads were found to have breached their own duty of care. *See id.* at 3-1.

There is no reason to believe that the FRSA, including its preemption language, was intended to radically alter the status quo with respect to the preemptive effect of federal spending programs relating to rail-highway safety (as opposed to direct federal regulation of railway safety). Neither the committee reports nor the members' statements contain any indication that Congress contemplated the elimination of a standard form of railroad tort liability whenever federal funds were involved in crossing safety projects. On the contrary, they demonstrate that Congress contemplated a dual federal-state regime. *See* 115 Cong. Rec. 40202-40207 (Dec. 19, 1969); 116 Cong. Rec. 27610-27621 (August 6, 1970).

Moreover, the Secretary, in his 1989 Report to Congress on crossing safety, indicated that the federal gov-

ernment did not perceive that the extensive federal expenditures for grade crossing improvements had insulated railroads from liability. Quite the contrary: the Secretary stated explicitly that "[t]he trends and needs in this area [i.e., railroad liability for grade crossing accidents] appear largely to be decided by forces outside the reach of improvement and maintenance programs alone." U.S. Dept. of Transportation, *Rail-Highway Crossings Study* 7-6 (April 1989) (emphasis added). This statement would make no sense if, as the United States now argues, federal funding of grade crossing improvement projects provides a safe harbor for railroads by preempting any state law-based liability for breach of a duty of care with respect to warning devices. The Secretary's own statements thus make clear that the expenditure of federal funds does not involve the same subject matter as state law duties of care regarding the provision of warning devices. The regulations regarding federally funded projects therefore lack preemptive force under Section 434.

Given (1) the absence of any indication that federal standards relating to the expenditure of federal funds at grade crossings were intended to preempt any state tort actions against railroads, and (2) the fact that the issue of preemption as to federally funded grade crossings is not even presented here, the United States' position is particularly unwarranted. Furthermore, acceptance of the United States' position would simply multiply the practical difficulties posed by tort actions involving grade crossing safety devices. In each case, a determination would have to be made as to whether and to what extent the devices present at a crossing were the result of a federal funding project. Even if federal funding were implicated, the action could still go forward if the plaintiff could establish that the railroad had been involved in a violation of the open-ended standards affecting selection of warning devices for federally funded projects (*see* 23 C.F.R. § 646.214(b)(3)), an inquiry likely to present considerable opportunities for litigation. More-

over, as the United States concedes (*see supra* note 12), the plaintiff could still proceed with an action based on violation of a state law duty of care if there were “changed conditions” since the completion of the federal grade crossing improvement project. The bounds of this exception to preemption are unclear, and would create a quagmire of litigation. Absent a clearer indication that preemption with respect to federally funded grade crossings is warranted under the appropriately narrow reading of Section 434, the Court should not adopt a position that could yield such confusing and unproductive results.

III. A STATE LAW TORT ACTION BASED ON A TRAIN'S EXCESSIVE SPEED IN APPROACHING A GRADE CROSSING IS NOT PREEMPTED

A. The Secretary's Train Speed Regulations Do Not Address the Same Subject Matter as the State Tort Action

Both the district court and the court of appeals held that to the extent Ms. Easterwood sought to establish that CSX violated its duty of care by approaching the grade crossing at an excessive and unsafe speed, her right of action was preempted by 49 C.F.R. § 213.9, which provides maximum speed limits for trains operating on particular classes of track. The lower courts, echoed by CSX, its *amici*, and the United States, reasoned simply that the “subject matter” of both the federal regulation and the state tort action was train speed and that the state right of action was thus preempted. This analysis is untenable, for it is evident that the “subject matters” of the federal regulation and the state tort action—the safety issues they address—are entirely distinct.

Title 49 C.F.R. § 213.9, entitled “Classes of track: operating speed limits” addresses maximum train speeds based on the physical characteristics of railroad tracks. Other sections provide technical specifications for six classes of track, based on gage, alinement, number of crossties, and construction of joints. *See* 49 C.F.R. §§ 213.51-213.143. Section 213.9 simply establishes, for each class of track, the maximum allowable speed for

passenger and freight trains operating on that class of track. The regulation does not address any other factors bearing on appropriate train speed, such as visibility, traffic density, number of grade crossings, or weather conditions. Nor does the regulation (or the history of its promulgation) indicate that the Secretary has expressly determined that such factors should *not* affect train speed. Rather, the regulation is wholly silent on such matters. There is no indication that the regulation addresses anything more than its precise subject matter: the maximum speed the Secretary determined to be safe and appropriate for particular classes of track, viewed from the standpoint of preventing “track-related accidents” such as derailments and track failures. *See, e.g.*, 44 Fed. Reg. 52104, 52106-10 (Sep. 6, 1979); 47 Fed. Reg. 7275 (Feb. 18, 1982).

Indeed, 49 C.F.R. § 213.1, which defines the scope of all regulations contained in Part 213, makes clear the limited function of Section 213.9: “This part prescribes initial minimum safety requirements for railroad track that is part of the general railroad system of transportation. The requirements prescribed in this part *apply to specific track conditions existing in isolation*” (emphasis added). Thus, it is evident that Section 213.9 was *not* intended to address comprehensively the subject matter of all factors bearing on safe train operating speeds, but—*simply to address, in isolation, the question of maximum speeds appropriate for physical classes of track.*

By contrast, the subject matter of Ms. Easterwood's tort action is *not* whether the train that killed her husband was operating at a speed appropriate for the class of track on which it was traveling viewed in isolation. Rather, it is whether the railroad violated its duty of care to operate at a reasonable rate of speed, viewed from the standpoint of the safety of persons using the grade crossing that the train was approaching. Nothing in the regulation governing maximum speeds for track classes speaks to this subject at all. The subject is, however, a classic concern of the common law. *See* 74 C.J.S. *Railroads* § 744 (1951).

Thus, the preemption argument of CSX and its *amici* (and the United States) rests on the notion that this Court must adopt the broadest construction of the "subject matter" of the Secretary's regulation and the Georgia tort remedy and hold the latter preempted because both relate to the subject of "speed."¹⁴ But such a decisional methodology is diametrically opposed to that which *Cipollone* mandates: namely, the use of a fair but narrow construction of the preemption provision. 112 S. Ct. at 2621. CSX's argument is also contradicted by the legislative history confirming that preemption occurs only when the Secretary has acted on the "particular subject matter" of a state regulation. H.R. Rep. No. 1194, 91st Cong., 2d Sess., reprinted in 1970 U.S. Code Cong. & Admin. News 4104, 4112 (emphasis added). A fair but narrow construction consistent with *Cipollone* and the legislative history would reject preemption on the ground that the Secretary's regulation and the state tort remedy do not pertain to the same subject matter because they serve wholly different functions and address distinct safety concerns.¹⁵ Even if the broader construction advanced by CSX might be permitted by the statutory language, the narrower construction must be chosen to effectuate the

¹⁴ In effect, the construction proposed by CSX and its *amici* is that a state standard is preempted if it relates in some way to the same aspect of railroad operations affected by a federal regulation. Had this been Congress' intent, it is clear that Congress knew how to express it. Cf. 15 U.S.C. § 1392(d) ("Whenever a Federal motor vehicle safety standard . . . is in effect, no State . . . shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.") (emphasis added).

¹⁵ Such a construction is consistent with *Burlington Northern R.R. Co. v. Montana*, 880 F.2d 1104, 1105 (9th Cir. 1989), which held that under Section 434, "a state regulation 'covers the same subject matter' as an FRA regulation if it addresses the same safety concerns as the FRA regulation" (emphasis added) (citation omitted). Under this standard, the Secretary's regulation and Georgia's tort remedy do not cover the same subject matter, as the safety concerns they address are dissimilar.

presumption against preemption absent a clear statement of Congress's intent. See *Cipollone*, 112 S. Ct. at 2620-21.

CSX contends, however, that a more narrow and focused interpretation of the regulatory "subject matter" under Section 434 conflicts with this Court's rulings in such cases as *Gade v. National Solid Wastes Mgmt. Ass'n*, 112 S. Ct. 2374, 2387 (1992) and *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963), which CSX argues demonstrate that differences in the purpose of state and federal regulations are irrelevant to preemption analysis. Even leaving aside the obvious point that these cases did not involve the particular statutory language present here, it is evident that those precedents do not go so far as CSX would have the Court believe. The central holding of *Gade*, an implied preemption case, is that a State's "professed purpose" for a regulation is not "solely" determinative of preemption issues; rather, the Court must analyze the actual function and effect of state and federal regulations to determine whether the state regulation "sufficiently interferes with federal regulation that it should be deemed pre-empted." 112 S. Ct. at 2387. Under this standard, it is clear that the federal track speed regulation and the state law duty of care do not in fact "'operate upon the same object,'" *id.* (citation omitted), nor does the state standard in any way interfere with the subject of the federal regulation.¹⁶

¹⁶ Similarly, while *Florida Lime & Avocado Growers* (like *Gade* an implied preemption case) stated that whether a state and federal regulation served different or similar objectives was not necessarily determinative of the preemption issue, see 373 U.S. at 142, the actual holding of the Court was that a state regulation was not preempted by a federal regulation where, despite a superficial similarity in purpose and "subject matter," the two regulations served different and not contradictory functions. See *id.* at 145-46. There is likewise no preemption here where the state standard and federal regulation address different issues and have different, noncontradictory functions.

B. The Federal Regulations Do Not Reflect a Judgment That Trains Should Not Moderate Their Speed to Enhance Crossing Safety

CSX and its *amici* argue at length that decreased train speed does not in any way enhance crossing safety, and that the Secretary's regulations implicitly reflect a judgment that there should be no state or federal regulation of train speed beyond that contained in 49 C.F.R. § 213.9. These arguments are, of course, of dubious relevance given that this is an express preemption case. Under *Cipollone*, the existence of an express preemption provision in a statute obviates any inquiry into implied preemption: the scope of preemption is determined by the statute's express terms. See *Cipollone*, 112 S. Ct. at 2618.¹⁷ Moreover, the nature of the preemption provision here underscores the absence of any implied preemption: Section 434 expressly permits *any* state regulation with respect to railroad safety unless the Secretary has promulgated regulations addressing the particular subject matter.

In any event, the policy arguments of CSX and its *amici* are far from persuasive. The factual record before this Court simply does not permit the Court to make a judgment that state law-based restrictions on excessive train speed produce no safety benefits or are counterproductive. Moreover, the railroads' arguments in this respect suffer obvious logical flaws. CSX and its *amici* stress that even at reduced speeds trains will usually be unable to brake in time to avoid a crossing accident, and that any attempt to do so will pose grave risks of derailment. But even if this is true, reduced train speeds still have obvious safety benefits in that they allow motor vehicle drivers at grade crossings increased time for reaction and avoidance, and may significantly reduce the severity of grade crossing accidents.

For these reasons, the Secretary of Transportation has—contrary to the assertions of CSX and its *amici*—identi-

¹⁷ Thus, the United States' half-hearted argument that it has effectively occupied the field with respect to train speed, see U.S. Br. 29-30, is simply inadmissible.

fied high train speeds as a serious safety concern. In the Secretary's 1989 Report to Congress, the hazards of high speed trains received repeated emphasis. The Report attributed recent increases in grade crossing accident fatalities to "higher average train speeds" resulting from upgraded track conditions. U.S. Dept. of Transportation, *Rail-Highway Crossings Study* 2-10 (April 1989). Moreover, the Report emphasized that increased train speeds make crossing accidents more likely (*id.* at 6-6):

[T]he driver's task of determining whether a train is approaching and whether it is safe to proceed is difficult; even with good visibility up and down the track, it is difficult from the crossing to judge the time and distance of a train approaching at moderate speed. At high train speeds, the problem is critically compounded.

Thus, the Report found, "the hazards inherent at any crossing would be compounded by the presence of high-speed trains, particularly if there were a mix of high-speed and low-speed movements." *Id.* at 6-5.¹⁸

Ultimately, of course, the preemption issue depends not on this Court's judgment whether it is reasonable for the States to hold railroads to a duty of care with regard to train speed, but whether the Secretary of Transportation has preempted such a duty by promulgating regulations addressing the same subject matter. CSX attempts to argue that the Secretary has regulated the subject matter of train speed at crossings not by issuing a regulation applicable to that particular subject matter, but rather by providing that active warning signals at grade crossings must provide no less than 20 seconds warning of the approach of a train, regardless of its speed. MUTCD 8C-7.¹⁹ Plainly, however, this provision does not address

¹⁸ See also National Transportation Safety Board, Safety Recommendations R-86-49 through 57 (Jan. 13, 1987) (identifying high speed of trains as factor in reducing effectiveness of train horns as warning device).

¹⁹ This provision in the Manual, of course, applies only where active warning signals are provided, and there is no dispute that

the subject matter of reasonable train speed at grade crossings—it is simply agnostic on the subject. CSX's error is in assuming equivalence between a regulation providing that "whatever the speed of the train, a warning device should provide 20 seconds' warning" and one that provides that "if there is 20 seconds' warning, any train speed is permissible." The subject of adequate warning time (whatever the train's speed) is, under the appropriately fair but narrow construction of Section 434, not the same as the subject of reasonable train speed.

What CSX would have the Court believe is that the Secretary's regulations reflect a determination that it is *not* appropriate to require trains to pay any attention to crossings in determining their speeds, and that instead trains should be free to proceed through any crossing at the maximum allowable speed for the physical class of track involved, so long as active warning devices (if any) are set to provide 20 seconds' warning to motorists. Of course, had the Secretary actually promulgated a regulation stating this, it would have preemptive effect. But CSX points to no such regulation, nor to any indication in the history of the Secretary's regulations reflecting that such a determination has been made. All CSX can point to is an implication from silence—that since the Secretary has not promulgated regulations indicating that trains should approach grade crossings at a reasonable

the Manual does not mandate the use of such signals at any crossing. It is therefore implausible to convert this standard into one that addresses the subject of train speeds at crossings generally. Similarly, CSX's reliance on the portions of 23 C.F.R. § 646.214 (b)(3)(i) that indicate that train speeds are among the factors to be considered in determining when automatic gates are to be used at *federally funded crossings* is irrelevant to this case, for the reasons stated *supra*, at 10-17. Finally, contrary to CSX's assertion, the statement in 49 C.F.R. § 213.9(c) that grade crossing protection should be considered when a railroad requests permission to operate at speeds in excess of 110 miles per hour (a circumstance not present here) does not indicate that the Secretary has regulated with respect to the subject matter of train speeds at grade crossings outside of that narrow situation.

speed, the Secretary must have intended that railroads be free from any such obligation. But under the terms of Section 434, such an implication is, precisely, *not* sufficient to preempt state law. Section 434 specifies how state law is preempted: there must be a federal regulation that actually addresses the particular subject matter of the state law. With respect to train speed at grade crossings, there is no such federal regulation.

IV. STATE TORT REMEDIES FOR BREACH OF A RAILROAD'S DUTY OF CARE WITH RESPECT TO CROSSING SAFETY OR TRAIN SPEED ARE NOT PREEMPTED BECAUSE THEY ADDRESS ESSENTIALLY LOCAL SAFETY HAZARDS

Even if federal regulations could be said to cover the same "subject matter" as Ms. Easterwood's causes of action based on CSX's alleged negligence with respect to crossing safety devices and train speeds, those causes of action would still not be preempted because they fall within Section 434's savings clause for local hazards. This provides: "[a] State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce."

The duty of care Ms. Easterwood's tort cause of action seeks to impose on CSX reflects precisely such a standard aimed at "essentially local safety hazards." The essence of Ms. Easterwood's claims is that CSX's actions were not reasonable in light of the particular local circumstances of the crossing where her husband was killed. The common law duties that Ms. Easterwood seeks to enforce inherently concern local hazards, and fall within the scope of the savings clause. Only in the most abstract and general sense can these duties be considered "State-wide standards superimposed on national standards covering the same subject matter" that Congress sought to preempt. H.R. Rep. No. 1194, 91st Cong., 2d Sess., *re-*

printed in 1970 U.S. Code Cong. & Admin. News 4104, 4117. Rather, the perpetuation of such common law duties accords with the legislative intention to "enable the States to respond to local situations not capable of being adequately encompassed within uniform national standards," and to take action with respect to "local hazards . . . not Statewide in character." *Id.* Given the need to interpret the statute narrowly to avoid preemption, Ms. Easterwood's tort remedy must be considered to be aimed at "essentially local safety hazards." Since it is clearly not incompatible with federal law, it cannot be preempted unless it imposes an undue burden on interstate commerce, which cannot be established on the present record.

Such a narrow reading of Section 434's preemptive scope as to state law tort remedies is supported not only by the presumption against preemption, but also by the absence of any suggestion in the legislative history that Section 434 was intended to preempt state tort actions based on allegations that a railroad violated its duty of care with respect to a particular local incident. Neither the House Report, *supra*, nor the floor debates indicate any discussion of the possibility that the statute was intended to preempt such tort remedies. See 115 Cong. Rec. 40202-07 (Dec. 19, 1969); 116 Cong. Rec. 27610-21 (Aug. 6, 1970). Particularly in light of the absence of any clear indication that Congress intended to displace this well-established body of state common law, the savings clause should be given its fair but narrow reading to preserve common law remedies based on local conditions.

CONCLUSION

In No. 91-790, the judgment of the court of appeals should be affirmed insofar as it holds Ms. Easterwood's right of action based on CSX's alleged failure to exercise due care with respect to crossing safety devices is not preempted. In No. 91-1206, the judgment of the court of appeals should be reversed insofar as it holds Ms. Easterwood's right of action based on the allegedly excessive speed of CSX's train is preempted.

Respectfully submitted,

SCOTT L. NELSON
MILLER, CASSIDY, LARROCA
& LEWIN
2555 M Street, N.W.
Washington, D.C. 20037
(202) 293-6400

October 13, 1992

RICHARD RUDA *
Chief Counsel
JAMES I. CROWLEY
STATE & LOCAL LEGAL CENTER
444 North Capitol St., N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850
* Counsel of Record for the
Amici Curiae

20

No. 91-790

FILED

OCT 13 1992

DEPT. OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1992

CSX TRANSPORTATION, INC.,

Petitioner,

v.

LIZZIE BEATRICE EASTERWOOD,

Respondant.

On Writ Of Certiorari To The
United States Court of Appeals
For The Eleventh Circuit

WILLIAM AND APPENDIX BRUCE CURTIS
OF COUNSEL WILSON PARRIS
IN SUPPORT OF RESPONDENT

J. B. GIBSON
JAMES S. GIBSON, JR.

WILLIAM AND APPENDIX BRUCE CURTIS

BEST AVAILABLE COPY

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1992

CSX TRANSPORTATION, INC.,

Petitioner,

v.

LIZZIE BEATRICE EASTERWOOD,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF AND APPENDIX *AMICUS CURIAE*

COMES NOW, Cynthia Wilson Pryor, by and through her attorney of record, pursuant to Rule 37 of the Supreme Court Rules, and files this brief amicus curiae in the above-captioned case. Petitioner and Respondent have given their written permission to file this brief as required by Rule 37.3 (Appendix p. 20-21). The amicus curiae would show the

Court that her interest in this matter is that she is a Plaintiff in a railroad crossing accident case predicated on the common law and a statute of the State of Tennessee, Cynthia Wilson Pryor v. Norfolk Southern Railway Co., No. 91-2983 4A (United States District Court, Western District of Tennessee, Western Division). The Supreme Court's determination of issues on appeal will materially affect the applicant's rights in her litigation.

TABLE OF CONTENTS

Table of Authorities	iv
Interest of Amicus Curiae	1
Statement of Facts	2
Summary of Argument	5
Argument	6
Conclusion	9
Certificate of Service	10
Appendix	11

TABLE OF AUTHORITIES

CASES

<u>Southern California Meat Cutters Union and Food Employers Pension Trust Fund v. Investors Research Co., 687 F.Supp. 506 (C.D. Cal. 1988)</u>	8
---	---

STATUTES

23 U.S.C. §123(d)	4 and Appendix, p.14
23 U.S.C. §130(a)	6
45 U.S.C. §434	6
Tenn. Code Ann. §65-11-113	5

REGULATIONS

23 C.F.R. §646.200(a)	6
23 C.F.R. §646.208	6
23 C.F.R. §646.216(b)	6
23 C.F.R. §646.216(f)(3)	7

INTEREST OF AMICUS CURIAE

The amicus curiae, Cynthia Wilson Pryor, was involved in a railroad crossing accident on Riverdale Road in Germantown, Tennessee on January 30, 1991. A Norfolk Southern Railway Company (hereinafter "Norfolk Southern") train hit Mrs. Pryor's automobile and caused catastrophic injuries to Mrs. Pryor. Mrs. Pryor subsequently filed an action in state court against Norfolk Southern alleging, in part, that the railroad breached its duty by operating its train negligently and by failing to provide adequate crossing warnings at the ultra-hazardous crossing. The Riverdale Road crossing is not protected with active warning signals, and a cross-buck sign located next to the track is the sole warning signal to motorists at the crossing. There are other confusing and misleading traffic signs for approaching motorists, and the sight distances at the crossing are substantially obstructed.

The action was removed to the United States District Court, Western District of Tennessee, Western Division.

The issue discussed herein brings a relevant matter to the attention of the Court that has not already been brought to its attention. See Rule 37.1. The accompanying brief demonstrates that Congress did not intend to preempt civil tort actions based on state common law. The federal statutes and regulations fail to empower a State Department of Transportation with authority to mandate the installation by the railroad of an adequate system of warning devices at an ultra-hazardous crossing.

STATEMENT OF FACTS

William Terry Cantrell, an engineer specialist with the Tennessee Department of Transportation (hereinafter "DOT"), was deposed in Mrs. Pryor's case. Mr. Cantrell is

involved with railroad safety and is on the Tennessee DOT's diagnostic team for railroad-highway crossing safety. Mr. Cantrell testified that Norfolk Southern was notified subsequent to Mrs. Pryor's accident that the diagnostic team recommended that active warning devices be installed at this crossing and that the railroad was requested to submit preliminary estimates and engineering.

At the time of the deposition, eight months had passed without any action by Norfolk Southern. In answer to a question of whose responsibility it is to see that railroads reasonably respond to the directions to properly signal crossings, Mr. Cantrell stated:

Q: Well, who's responsible for following up to see that the railroad reasonably respond to the directions to do something to properly signal these crossings?

A: There is to my knowledge no law that states that the railroads even have to do this. Not

too long ago, I want to say around 1984, there was a bunch of projects that were on our books that the railroads apparently disagreed with or did not want to do. And they were removed. There's no way that we can force them to actually do this, if they don't want to it. (Appendix p. 6, TR 218)

In addition, the state of Tennessee through legislative enactment has established a priority requiring railroads to install active warning devices at crossings where fatalities have occurred. Tenn. Code Ann. §65-11-113 (Appendix p. 14). The Tennessee DOT has apparently declined to enforce the state statute as established by Mr. Cantrell.

Q: You're saying that the State Department of Transportation doesn't see to the enforcement of this law?

A: There are no teeth in the law to my knowledge where we could enforce them. I'm not sure whether there's \$100 a day fine or anything to that effect. And that's what I've also heard, there are no teeth in the law to enforce such law. (Appendix p. 9-10, TR 221-222.)

SUMMARY OF THE ARGUMENT

There is no federal statutory or regulatory requirement that railroads complete preliminary engineering and construction of appropriate warning devices within a certain or reasonable time. Consequently, there is no incentive for a railroad to adequately signal a crossing in compliance with a DOT's determination or the Tennessee statute if the railroad is immune to an injured party's common law tort action or a tort action based on the railroad's breach of a state's statutory duty to install active warning devices at a crossing after a fatality has occurred. Congress did not intend to preempt the state statutes applicable to or common law actions against railroads by the passage of the Federal Railroad Safety Act of 1970, 45 U.S.C. §434, and leave the public and governmental authorities without a remedy for a noncooperative and delinquent railroad

jeopardizing public safety and welfare.

ARGUMENT

In an effort to eliminate hazards from railroad crossings, Congress provided federal funds for the costs of such construction. 23 U.S.C. §130(a). See also 23 C.F.R. §646.208. Later, Congress mandated each state to inventory its crossings and to establish and implement a schedule for improvements. 23 U.S.C. §123(d).

The United States Federal Highway Administration adopted regulations "to prescribe policies and procedures for advancing Federal-aid projects involving railroad facilities." 23 C.F.R. §646.200(a). These regulations envision cooperation between state government and the railroads. For example, 23 C.F.R. §646.216(b) provides for preliminary engineering work on crossing projects "[a]s mutually agreed to by the state

highway agency and the railroad." Also, the railroads must give the state and FHWA reasonable opportunity to inspect scrap materials it recovers during construction of improvements. 23 C.F.R. §646.216(f)(3).

There is not, however, any incentive for the railroad to cooperate in the improvement process or to make efforts to complete its work within a reasonable amount of time if tort actions based on state statutes or common law are preempted. As Mr. Cantrell's deposition testimony indicates, the railroads may not be compelled to correct ultra-hazardous crossings. Congress did not intend to preempt state statutes or common law that require railroads to act reasonably in signaling their crossings for the adequate protection of the public. Private civil tort actions based on state statutes or common law provide the only incentive to railroads to correct these hazardous crossings.

Similarly, in Southern California Meat Cutters Union and Food Employers Pension Trust Fund v. Investors Research Co., 687 F.Supp. 506 (C.D. Cal. 1988), the court addressed a broadly worded preemption statute. Section 1144 of ERISA preempts all state laws relating to employee benefit plans. Section 1109 provides for liability of an ERISA fiduciary caused by breach of that fiduciary's duty, but is silent as to the duty of a non-fiduciary. The issue arose whether Congress intended to preempt an action against a non-fiduciary based on state law. The court held, "The fact that ERISA is a comprehensive statute and yet does not provide a remedy for non-fiduciary misconduct is a good indication that Congress did not intend to regulate such behavior, but rather, that Congress believed regulation of fiduciary behavior would sufficiently protect benefit plans." Id. at 509.

CONCLUSION

In addition to the reasons cited by Respondent Easterwood in her Brief to this Court, this amicus curiae brings to the attention of the Court the fact that Congress did not intend to preempt state common law tort actions against railroads because the federal statutes and regulations which establish limited funding for the improvement of crossings do not empower the responsible federal and state agencies to insure that the improvements are made. The judgment in No. 91-790 should be affirmed.

Respectfully submitted,

J. N. Raines
James S. Strickland, Jr.
**GLANKLER, BROWN, GILLILAND,
CHASE, ROBINSON & RAINES**

1700 One Commerce Square
Memphis, Tennessee 38103
(901) 525-1322

Counsel for Amicus
Curiae Cynthia Wilson Pryor

CERTIFICATE OF SERVICE

I, J. N. Raines, a member of the Bar of this Court, pursuant to Rule 29 of the Supreme Court Rules, certify that the Brief of Amicus Curiae Cynthia Wilson Pryor has been mailed on October 13, 1992, via the United States mail service, with first class postage prepaid, to all parties required to be served as follows:

JACK H. SENTERFITT, Esq.
1201 West Peachtree
Atlanta, Georgia 30309-3424
(404) 881-7000
Counsel for Petitioner/Cross Respondent,
CSX Transportation, Inc.

JAMES I. PARKER, Esq.
P. O. Box 1018
Cedartown, Georgia
(404) 748-5643
Counsel for Respondent/Cross Petitioner
Lizzie Beatrice Easterwood

J. N. RAINES

TABLE OF APPENDIX

APPENDIX

PAGE

Deposition Transcript of
Willaim Terry Cantrell

Cover Sheet	1
Appearances	2-3
Page 3	4-5
Page 218	6-7
Page 221	8-9
Page 222	10-11
Notarization	12-13
Tennessee Code Annotated §65-11-113	14-19
Letters Authorizing Brief	20-21

IN THE CIRCUIT COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

CYNTHIA WILSON PRYOR,

Plaintiff,

vs.

No. 42332-5

NORFOLK SOUTHERN RAILWAY COMPANY,

Defendant.

The deposition of: WILLIAM TERRY CANTRELL
January 7, 1992

Examination by Mr. Raines Page 3

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///////// Jeske & Jeske ///////////
///////// 403 American Trust Building ///////////
///////// Nashville, Tennessee ///////////
///////// (615) 242-4441 ///////////
////////////////////////////////////

The deposition of William Terry Cantrell, taken by agreement, at James K. Polk Building, Nashville, Tennessee, beginning at 8:45 a.m., January 7, 1992, at the instance of the Plaintiff, pursuant to the provision of the Tennessee Rules of Civil Procedure.

Formalities as to caption, certificate, reading by the witness, signing by the witness, and filing are waived. Objections except as to the form of the questions are reserved for the hearing. The reporter, being a notary public, may swear and sign the name of the witness.

A P P E A R A N C E S:

For the Plaintiff:

Mr. J. N. Raines
Glankler, Brown, Gilliland
Chase, Robinson & Raines
1700 One Commerce Square
Memphis, Tennessee 38103

For the Defendant:

Mr. Everett B. Gibson
Everett B. Gibson Law Firm
950 Morgan Keegan Tower
50 North Front Street
Memphis, Tennessee 38103

* * * * *

WILLIAM TERRY CANTRELL,
having been first duly sworn, testified as
follows:

EXAMINATION BY MR. RAINES:

Q. Would you state your name, please.

A. William Terry Cantrell.

Q. And, Mr. Cantrell, what is your job?

A. I'm Engineer Specialist 1, Tennessee
Department of Transportation.

Q. What is the Tennessee Department of
Transportation?

A. What is the Tennessee Department of
Transportation? Multipurpose organization
directed to administer federal projects for
aeronautics, rail, highways, et cetera.

Q. State agency?

A. Yes, it is.

Q. And who heads up the state agency?

A. I guess Ned McWherter. He signs the
paycheck, but it's Commissioner Jimmy Evans
under him.

Q. Ned is the governor?

A. Yes, he is.

Q. And Jimmy Evans is the Commissioner
of the Department of Transportation?

A. That is correct.

Q. And that's considered in the state

EXAM BY MR. RAINES

* * *

A. No, not to my knowledge. This is Mr. Zager's area.

Q. Well, who's responsible for following up to see that the railroads reasonably respond to the directions to do something to properly signal these crossings?

A. There is to my knowledge no law that states that the railroads even have to do this. Not too long ago, I want to say around 1984, there was a bunch of projects that were on our books that the railroads apparently disagreed with or did not want to do. And they were removed. There's no way that we can force them to actually do this, if they don't want to do it.

Q. Well, why is it that you deal with the railroads? Why don't you go out and let this bid out to a general contractor to do the work that you think is necessary to protect

DEPOSITION OF WILLIAM TERRY CANTRELL 218
the citizens of the State of Tennessee?

A. Because it's -- well, this is something that happened years ago. The projects that they did not want to do had fallen from ranking. They actually proved to be right about the validity of those particular few crossings, the railroads. Since then I don't know of any crossings they have not done.

EXAM BY MR. RAINES

* * *

A. Yes, I am.

Q. And are you aware that a fatality --

MR. GIBSON: Excuse me, the statute in question was passed in 1974, two years after your fatality.

MR. RAINES: And the legislature made it retroactive.

Q. Are you familiar with the statute?

A. I'm familiar with it. I'm familiar with the statute. It was passed in '74 to my knowledge. I'm not sure that any of them were done retroactively because there wasn't records available before '74. But, again, this all predates me. I do know that the law is almost totally unenforceable. To my knowledge in the entire time I've been associated with this section, there has not been one instance where a railroad could possibly comply with this law because of the

materials hang-up. No railroad stocks surplus supplies or materials because each crossing is different. It has different requirements, circuitry, et cetera, and it's almost a customized situation. And I have never heard of anybody being able to complete a project within six months.

Q. You're saying that the State Department of Transportation doesn't see to the

EXAM BY MR. RAINES

* * *

enforcement of this law?

A. There are no teeth in the law to my knowledge where we could enforce them. I'm not sure whether there's \$100 a day fine or anything to that effect. And that's what I've also heard, there are no teeth in the law to enforce such a law.

Q. So to your knowledge the State Department of Transportation does not enforce that law?

A. No.

MR. RAINES: I believe that's all the questions I have.

MR. GIBSON: I have got to the go to the airport. You're not going to examine those files that show what other crossings were --

MR. RAINES: Well, I'm not going to do it today.

MR. GIBSON: Well, I'll reserve my cross-examination then for when we resume for you to do whatever you're going to do.

MR. RAINES: I'm not sure we'll come back. If you want to --

MR. GIBSON: Let's do it all at once.

MR. RAINES: I know I may or may not have further questions.

EXAM BY MR. RAINES

* * *

STATE OF TENNESSEE)
) ss.
COUNTY OF DAVIDSON)

I, Laura L. Meyer, Notary Public in and
for the State of Tennessee at Large,

DO HEREBY CERTIFY that the foregoing
deposition was taken at the time and place et
forth in the caption thereof; that the
deponent therein was duly worn on oath to
testify the truth; that the proceedings of
said deposition were stenographically reported
by me in the shorthand; and that the foregoing
pages constitute a true and correct
transcription of said proceedings to the best
of my ability.

I FURTHER CERTIFY that I am not a
relative of employee or attorney or counsel of
any of the parties hereto; nor a relative or
employee of such attorney or counsel, nor do I
have any interest in the outcome or events of
this action.

IN WITNESS WHEREOF, I have hereunto

affixed my official signature and seal of
office this 15th day of January 1992, at
Nashville, Davidson County, Tennessee.

Laura L. Meyer
Notary at Large
State of Tennessee

My Commission Expires:
November 27, 1993.

65-11-113. Automatic warning or protective devices. -- (a)(1) Within six (6) months after the occurrence of a fatality resulting from a collision between any railroad engine or train and a vehicle or pedestrian at any unmarked railroad grade crossing, where there are regularly scheduled trains, one (100) or more vehicles cross daily and it is also a regular school bus crossing, and/or upon the order of the commissioner of transportation or his designee, the railroad company responsible for maintaining the track and right of way at such grade crossing shall install or cause to be installed a railroad crossing marker with automatic flashing signal lights and a bell on either side of the tracks along such street, road or highway crossing such tracks, in such a manner that approaching motorists, riders or pedestrians may be warned of the hazard and alerted to watch for an oncoming train or engine.

(2) A railroad company shall have six (6) months from the time of an order of the commissioner or his designee in which to install or cause to be installed the automatic warning or protective devices required. If such devices are not installed and operative at the end of this period of time, and the commissioner has not granted an extension based on hardship or act of God, the speed of trains operating within one (1) mile in each direction of such crossing shall be restricted to not more than twenty-five (25) miles per hour. This restriction shall continue until the devices are fully operational.

(b)(1) The cost of installing such signal devices shall be borne equally by the railroad company, the state of Tennessee, and the county, or the municipality, if such signal devices are installed within the corporate limits or the metropolitan government, where applicable.

(2) Payment of the state's share shall be made as reimbursement of the railroad company of one third (1/3) of the cost of such installation, by warrant of the commissioner of finance and administration upon the state treasury, after inspection of the site and certification by the commissioner of transportation or his designee that such signal devices have been installed in compliance with this section; provided that the railroad company has first submitted to the commissioner of finance and administration a sworn statement of the total costs incurred by the railroad company in installing such signal devices.

(3) Payment of the municipality's or county's or metropolitan government's share of the costs shall similarly be made in accordance with the fiscal procedures of such municipality, county, or metropolitan government after receipt of a sworn statement

from the railroad company of the total cost of the installations and verification of such installation by the appropriate municipal, county or metropolitan government official.

(c) If any county, municipal or metropolitan government fails or refuses to reimburse the railroad company as provided herein, the commissioner of finance and administration shall cause the necessary amount of money to be withheld from such county, municipal or metropolitan government any amount due such county, municipal or metropolitan government from the proceeds of the state gasoline tax and reimburse the railroad company using such funds otherwise due the county, municipal or metropolitan government. The Tennessee department of transportation shall be prohibited from adopting any rules or regulations which will circumvent the purposes of this section by setting incompatible criteria for determining

priorities for the installation of railroad crossing signals.

(d) In the event federal funds are available to defray the cost of such installation in whole or in part, the federal rules then applicable shall determine the allocation of the costs of such installation.

(e) Any railroad company failing to comply with the requirements of subsections (a)-(d) are subject to a fine of not less than five hundred dollars (\$500) nor more than one thousand dollars (\$1,000) for each day of continued violation.

(f) The department of transportation is authorized to construct protective or warning devices at or in the vicinity of any railroad crossing of a public highway owned by a county or incorporated city or town, based upon the showing of need resulting from a multidisciplinary study, whenever federal funds are available for such construction.

The department is further authorized to supply a maximum of one percent (1%) of the funds required for such construction provided the county or incorporated city or town in which the construction will be performed complies with the necessary conditions for receipt of the balance of federal matching funds for such construction. [Acts 1974, ch. 646, §§ 1,2; Acts 1979, ch. 236, § 1; T.C.A., §§65-1113, 65-1115; Acts 1983, ch. 184, § 1; T.C.A., § 65-114.]

September 25, 1992

James I. Parker, Esq.
P.O. Box 1018
Cedartown, Georgia 30125

Via Telefax
(404) 748-5128

Jack H. Senterfitt, Esq.
1201 West Peachtree
Atlanta, Georgia 30309-3424

Via Telefax
(404) 881-7777

Re: Pryor v. Norfolk Southern Railway
Co.
Amicus Curiae Brief of Cynthia
Wilson Pryor
Our File No. 04185.4967

Gentlemen:

After sending each of you our Brief and Appendix Amicus Curiae of Cynthia Wilson in support of Respondent, our office spoke with Mr. Parker. He informed us that each party has agreed to consent to the filing of all amicus curiae briefs.

Under the Supreme Court rules, we must obtain the written consent of each of you. Please sign the bottom of this letter and fax it back to me today representing your consent to our filing the brief. Our fax number is (901) 525-2389.

Very truly yours,

GLANKLER, BROWN, GILLILAND,
CHASE, ROBINSON & RAINES

J. N. Raines

GLANKLER, BROWN, GILLILAND, CHASE, ROBINSON & RAINES

Mr. James I. Parker
Mr. Jack Senterfitt
Page 2
September 25, 1992

/s/
JAMES I. PARKER
Attorney for
Respondent

Dated: 10/12/92

/s/
JACK SENTERFITT
Attorney for
Petitioner

Dated: 10/12/92

Nos. 91-790 and 91-1206

Supreme Court, U.S.
FILED
OCT 13 1992
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

CSX Transportation, Inc.,

Petitioner,

v.

Lizzie Beatrice Easterwood,

Respondent.

Lizzie Beatrice Easterwood,

Cross-Petitioner,

v.

CSX Transportation, Inc.,

Cross-Respondent.

On Writs of Certiorari to
the United States Court of Appeals
for the Eleventh Circuit

**AMICI CURIAE BRIEF OF THE STATES OF
OHIO, ARKANSAS, CONNECTICUT, DELAWARE,
FLORIDA, ILLINOIS, IOWA, MASSACHUSETTS,
MINNESOTA, MONTANA, NEVADA, NEW MEXICO,
PENNSYLVANIA, TEXAS AND WYOMING
IN SUPPORT OF RESPONDENT AND
CROSS-RESPONDENT
LIZZIE BEATRICE EASTERWOOD**

LEE FISHER

Attorney General of Ohio

NANCY J. MILLER *

Deputy Chief Counsel

Ohio Attorney General's Office

30 East Broad Street

Columbus, Ohio 43266-0410

(614) 466-5026

* Counsel of Record

[additional counsel listed on inside cover]

BEST AVAILABLE COPY

WINSTON BRYANT
Attorney General
State of Arkansas
323 Center Street, Suite 200
Little Rock, Arkansas 72201

RICHARD BLUMENTHAL
Attorney General
State of Connecticut
Office of the Attorney General
55 Elm Street
Hartford, Connecticut 06106

CHARLES M. OBERLY III
Attorney General
State of Delaware
Office of the Attorney General
820 North French Street, 8th Floor
Wilmington, Delaware 19801

ROBERT A. BUTTERWORTH
Attorney General
State of Florida
The Capitol
Tallahassee, Florida 32399-1050

RONALD W. BURRIS
Attorney General
State of Illinois
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601

BONNIE J. CAMPBELL
Attorney General
State of Iowa
Office of the Attorney General
Hoover State Office Building
Second Floor
Des Moines, Iowa 50319

SCOTT HARSHBARGER
Attorney General
Commonwealth of Massachusetts
One Ashburton Place
Boston, Massachusetts 02408-4698

HUBERT H. HUMPHREY III
Attorney General
State of Minnesota
Office of the Attorney General
102 State Capitol
St. Paul, Minnesota 55155

MARC RACICOOT
Attorney General
State of Montana
Office of the Attorney General
Justice Building
215 North Sanders
Helena, Montana 59620-1430

FRANKIE SUE DEL PAPA
Attorney General of Nevada
Capitol Complex
Carson City, Nevada 89710

TOM UDALL
Attorney General
State of New Mexico
Office of the Attorney General
Bataan Memorial Building
Santa Fe, New Mexico 87504-1508

ERNEST D. PREATE JR.
Attorney General
Commonwealth of Pennsylvania
Office of the Attorney General
Strawberry Square, 16th Floor
Harrisburg, Pennsylvania 17120

DAN MORALES
Attorney General
State of Texas
Office of the Attorney General
Capitol Station
P.O. Box 12548
Austin, Texas 78711-2548

JOSEPH B. MEYER
Attorney General
State of Wyoming
123 State Capitol
Cheyenne, Wyoming 82002

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES.....	vii
STATEMENT OF INTEREST.....	1
SUMMARY OF ARGUMENT.....	2
ARGUMENT.....	4

<p>I By enacting 23 U.S.C. §409, Congress has sought to recognize important state functions by preserving common law tort claims against railroads for injuries and deaths attributable to collisions at public grade crossings</p>	4
---	---

Authorities cited in Argument I:

23 U.S.C. §409.....	4
Pub. L. 102-240, Title I, §1035(a), Dec. 18, 1991, 105 Stat. 1978.....	5
<i>Heydenfeldt v. Daney Gold and Silver Mining Co.</i> , 93 U.S. 634 (1877).....	6
<i>Mobil Oil Corp. v. Higginbotham</i> , 436 U.S. 618 (1978).....	6
<i>Goodyear Atomic Corp. v. Miller</i> , 486 U.S. 174 (1988).....	6
<i>Director, OWCP v. Perini North River Associates</i> , 459 U.S. 297 (1983).....	6
12 U.S.C. §1715z-17(d).....	6
12 U.S.C. §1715z-18(e).....	6
17 U.S.C. §301(c).....	6

TABLE OF CONTENTS (cont'd)

	Page
29 U.S.C. §653(b)(4).....	6
29 U.S.C. §1144.....	6
II. Federal statutes and regulations that address railroad safety do not constitute a clear and manifest congressional intent to preempt state tort actions against railroads for failure to provide safe public grade crossings.....	7
Authorities cited in Argument II:	
<i>English v. General Elec. Co.</i> , ___ U.S. ___, 110 S. Ct. 2270 (1990).....	7
<i>Schneidwind v. ANR Pipeline Co.</i> , 485 U.S. 293 (1988).....	7
<i>Merrill Lynch, Pierce, Fenner & Smith v. Ware</i> , 414 U.S. 117 (1973).....	7
<i>Alessi v. Raybestos-Manhattan, Inc.</i> , 451 U.S. 504 (1981).....	7
<i>California v. Federal Energy Regulatory Commission</i> , ___ U.S. ___, 110 S. Ct. 2024 (1990).....	7
<i>Hines v. Davidowitz</i> , 312 U.S. 52 (1941).....	8
<i>Goodyear Atomic Corp. v. Miller</i> , 486 U.S. 174 (1988).....	8
<i>Silkwood v. Kerr-McGee Corp.</i> , 464 U.S. 238 (1984).....	8

TABLE OF CONTENTS (cont'd)

	Page
<i>Maurer v. Hamilton</i> , 309 U.S. 598 (1940)....	8
<i>Ferebee v. Chevron Chemical Co.</i> , 736 F.2d 1529 (C.A. D.C. 1984), cert. denied, 469 U.S. 1062 (1984).....	8
<i>United States v. Bass</i> , 404 U.S. 336 (1971)....	8
<i>Nader v. Allegheny Airlines, Inc.</i> , 426 U.S. 290 (1976)	8
<i>Metropolitan Life Insur. Co. v. Massachusetts</i> , 471 U.S. 724 (1985).....	9
23 U.S.C. §409.....	9
A. FRSA Section 434 and accompanying legislative history do not express a clear and manifest congressional intent to preempt state common law tort actions against railroads.....	9
Authorities cited in Argument II(A):	
45 U.S.C. §421.....	9
45 U.S.C. §433.....	10
45 U.S.C. §434.....	10
<i>English v. General Electric Co.</i> , ___ U.S. ___, 110 S. Ct. 2270 (1990).....	11
<i>Jones v. Rath Packing Co.</i> , 431 U.S. 519 (1977).....	11

TABLE OF CONTENTS (cont'd)

	Page
<i>Cipollone v. Liggett Group, Inc.</i> , ___ U.S. ___, 112 S. Ct. 2608 (1992).....	11
15 U.S.C. §1331, <i>et seq.</i>	11
15 U.S.C. §1334.....	11
45 U.S.C. §433.....	12
49 C.F.R. §213.....	12
49 C.F.R. §215.....	12
45 U.S.C. §221.....	12
49 C.F.R. §223.....	12
49 C.F.R. §229.....	12
H.R. Rep. No. 91-1194, 91st Cong., 2nd Sess. 11, <i>reprinted in</i> 1970 U.S. Code Cong. & Admin. News 4104.....	14
H.R. Rep. No. 93-118, 93rd Cong., 1st Sess., <i>reprinted in</i> 1973 U.S. Code Cong. & Admin. News 1859.....	14
Hearings before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 91st Cong., 2d Sess. 51 (1970) (written statement of John Volpe, Secretary of Transportation).....	15
<i>Wisconsin Public Intervenor v. Mortier</i> , ___ U.S. ___, 111 S. Ct. 2476 (1991).....	16
45 U.S.C. §431.....	16

TABLE OF CONTENTS (cont'd)

	Page
Senate Report No. 100-153, 100th Congress, 2d Sess. 4, <i>reported in</i> 1988 U.S. Code Cong. & Admin. News 716.....	16
<i>Morales v. Trans World Airlines, Inc.</i> , ___ U.S. ___, 112 S. Ct. 2031 (1992).....	17
B. Federal regulations promulgated under the Federal Highway Safety Act do not address a railroad's duty to provide active warning equipment at public grade crossings and, therefore, have no preemptive effect upon tort actions that establish such a duty.....	18
Authorities cited in Argument II(B):	
<i>Hillsborough County, Fla. v. Automated Med. Labs</i> , 471 U.S. 707 (1985).....	18
23 C.F.R. §646.200(a).....	19
23 U.S.C. §401.....	19
23 U.S.C. §402.....	19
23 U.S.C. §130.....	19
23 C.F.R. §§646.206-646.214.....	19
23 C.F.R. §655.601.....	19
23 C.F.R. §646.214(b).....	19
23 C.F.R. §646.210(b).....	20

TABLE OF CONTENTS (cont'd)

	Page
45 U.S.C. §421	20
<i>Easterwood v. CSX Transportation, Inc.</i> , 933 F.2d 1548 (11th Cir. 1991), cert. granted, 60 U.S.L.W. 386 (1992)	22
<i>Silkwood v. Kerr-McGee Corp.</i> , 464 U.S. 238 (1984)	22
CONCLUSION	23

TABLE OF AUTHORITIES

	Page(s)
Cases:	
<i>Alessi v. Raybestos-Manhattan, Inc.</i> , 451 U.S. 504 (1981)	7
<i>California v. Federal Energy Regulatory Commission</i> , ___ U.S. ___, 110 S. Ct. 2024 (1990)	7
<i>Cipollone v. Liggett Group, Inc.</i> , ___ U.S. ___, 112 S. Ct. 2608 (1992)	11,12
<i>Director, OWCP v. Perini North River Associates</i> , 459 U.S. 297 (1983)	6
<i>Easterwood v. CSX Transportation, Inc.</i> , 933 F.2d 1548 (11th Cir. 1991), cert. granted, 60 U.S.L.W. 386 (1992)	22
<i>English v. General Elec. Co.</i> , ___ U.S. ___, 110 S. Ct. 2270 (1990)	7,11
<i>Ferebee v. Chevron Chemical Co.</i> , 736 F.2d 1529 (C.A. D.C. 1984), cert. denied, 469 U.S. 1062 (1984)	8
<i>Goodyear Atomic Corp. v. Miller</i> , 486 U.S. 174 (1988)	6,8
<i>Heydenfeldt v. Daney Gold and Silver Mining Co.</i> , 93 U.S. 634 (1877)	6
<i>Hillsborough County, Fla. v. Automated Med. Labs</i> , 471 U.S. 707 (1985)	18
<i>Hines v. Davidowitz</i> , 312 U.S. 52 (1941)	8
<i>Jones v. Rath Packing Co.</i> , 431 U.S. 519 (1977)	11

TABLE OF AUTHORITIES (cont'd)

	Page(s)
<i>Maurer v. Hamilton</i> , 309 U.S. 598 (1940)....	8
<i>Merrill Lynch, Pierce, Fenner & Smith v. Ware</i> , 414 U.S. 117 (1973).....	7
<i>Metropolitan Life Insur. Co. v. Massachusetts</i> , 471 U.S. 724 (1985).....	9
<i>Mobil Oil Corp. v. Higginbotham</i> , 436 U.S. 618 (1978).....	6
<i>Morales v. Trans World Airlines, Inc.</i> , ___ U.S. ___, 112 S. Ct. 2031 (1992).....	17
<i>Nader v. Allegheny Airlines, Inc.</i> , 426 U.S. 290 (1976).....	8
<i>Schneidwind v. ANR Pipeline Co.</i> , 485 U.S. 293 (1988).....	7
<i>Silkwood v. Kerr-McGee Corp.</i> , 464 U.S. 238 (1984).....	8,22
<i>United States v. Bass</i> , 404 U.S. 336 (1971)....	8
<i>Wisconsin Public Intervenor v. Mortier</i> , ___ U.S. ___, 111 S. Ct. 2476 (1991).....	16
Statutes:	
12 U.S.C. §1715z-17(d)	6
12 U.S.C. §1715z-18(e).....	6
15 U.S.C. §1331, <i>et seq.</i>	11
15 U.S.C. §1334.....	11

TABLE OF AUTHORITIES (cont'd)

	Page(s)
17 U.S.C. §301(c).....	6
23 U.S.C. §130.....	19
23 U.S.C. §401.....	19
23 U.S.C. §402.....	19
23 U.S.C. §409.....	2,4,5, 6,9
29 U.S.C. §653(b)(4).....	6
29 U.S.C. §1144.....	6
45 U.S.C. §421.....	9,18
45 U.S.C. §431.....	16
45 U.S.C. §433.....	10,12
45 U.S.C. §434.....	2,9,13, 16

Other Authorities:

23 C.F.R. §646.200(a).....	19
23 C.F.R. §§646.206-646.214.....	19
23 C.F.R. §646.210(a).....	19
23 C.F.R. §646.214(b).....	19
23 C.F.R. §655.601.....	19

TABLE OF AUTHORITIES (cont'd)

	Page(s)
49 C.F.R. §213	12
49 C.F.R. §215	12
49 C.F.R. §223	12
49 C.F.R. §229	12
49 C.F.R. §234	13
Pub. L. 102-240, Title I, §1035(a), Dec. 18, 1991, 105 Stat. 1978	5
H.R. Rep. No. 91-1194, 91st Cong., 2nd Sess. 11, <i>reprinted in</i> 1970 U.S. Code Cong. & Admin. News 4104	14
H.R. Rep. No. 93-118, 93rd Cong., 1st Sess., <i>reprinted in</i> 1973 U.S. Code Cong. & Admin. News 1859	14
Hearings before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 91st Cong., 2d Sess. 51 (1970) (written statement of John Volpe, Secretary of Transportation)	15
Senate Report No. 100-153, 100th Congress, 2d Sess. 4, <i>reported in</i> 1988 U.S. Code Cong. & Admin. News 716	16

STATEMENT OF INTEREST

Tort liability and remedies create dynamic incentives for responsible industry conduct to prevent future harm and promote the public health and safety. States have a vital interest in preserving their inherent police power to compensate victims of tortious conduct, especially where, as here, no comparable federal remedy is available.

Unquestionably, the amici states have a substantial interest in minimizing deaths and injuries from accidents at unsafe public grade crossings. As a single example, the State of Ohio experiences rail traffic from four major rail carriers, high-speed AMTRAK passenger trains, and a host of regional and short-line railroads that operate over more than 6,000 miles of trackage across the state. With approximately 6,500 public grade crossings, Ohio ranked second only to the state of Texas in injuries and fatalities resulting from grade crossing accidents in 1991. During that timeframe, Ohio experienced a total of 316 grade crossing accidents, resulting in 56 fatalities and 121 injuries. Thousands of public grade crossings in the amici states are only passively protected with crossbuck signage that provides no warning to motorists of approaching trains.

The Court must continue to recognize the important supplementary role occupied by state courts in promoting public safety in the face of widespread railroad operations throughout the amici states. Reversal of the decision below will drastically limit availability of tort remedies, and greatly impair important state functions advanced by state common law. The Court should be highly circumspect of railroad industry attempts to achieve such a significant erosion of authority traditionally reserved to the states.

Accordingly, amici submit this brief, pursuant to Supreme Court Rule 37.5, to assist the Court in the resolution of this case, and to urge the Court to hold that federal statutes and regulations do not preempt common law tort actions against railroads.

SUMMARY OF ARGUMENT

The court below correctly held that federal law, principally the Federal Railroad Safety Act (FRSA), and related regulations, do not preempt Respondent's tort action against CSX Transportation, Inc. (CSX or Railroad) for failure to provide adequate warning devices at a public grade crossing controlled by CSX.¹ With enactment of the FRSA, Congress established that state regulations relating to railroad safety shall continue in force until the Secretary of Transportation promulgates regulations covering the subject matter of the state requirement. 45 U.S.C. §434. The issue before the Court is whether the Secretary has issued regulations addressing a railroad's duty of care under state law to provide adequate warning devices at public grade crossings.

The regulatory and compensatory aspects of the common law represent a critical exercise of the inherent police powers reserved to the several states. Sensitive to concerns of federalism, Congress has recognized the sound public policy of preserving from preemption the public's right to pursue such actions, as embodied in the plain language of 23 U.S.C. §409. That statute unequivocally contemplates tort actions for damages against railroads arising from vehicle-train collisions at public grade crossings, and provides an independent basis upon which to affirm the decision below.

The Railroad's attempts to advance broad preemption of common law actions finds no better support under the FRSA, the Federal Highway Safety Act (FHSA), or current federal regulations addressing railroad safety matters. Existing federal regulations create federally-funded programs and establish

standards for design, engineering, and placement of safety warning equipment at grade crossings where federal funds are utilized for such improvements. The *duty* to install such devices, the focus of a tort action, requires a fact-sensitive determination based upon specific circumstances at a specific location, and therefore embodies an analysis not readily susceptible to "coverage" by uniform federal regulation.

Continued access to state courts does not conflict with or obstruct any overriding federal congressional purpose. The stated purpose of the FRSA is to improve safety in all areas of railroad operations and to reduce injuries and deaths. 45 U.S.C. §421. State tort actions work largely to achieve the same ends. An award of tort damages fairly compensates victims of tortious conduct and creates strong incentives for railroads to seriously undertake their well-established common law responsibility to provide safe grade crossings for public usage.

The Court should be reluctant to adopt the untenable result sought by CSX that would require state courts to abdicate their long-established role in promoting safer grade crossings. Under the guise of preemption, CSX seeks to convert federal statutes and regulations, intended to promote safety, into a shield to insulate it from liability for foreseeable harm at public grade crossings under its direct supervision and control. Congress could not possibly have intended such an absurd result.

¹ Respondent Easterwood raised several claims for negligence against CSX below. This brief addresses only Respondent's claim against the Railroad for failure to provide adequate warning devices at the Cook Street grade crossing where Respondent's husband was struck and killed.

ARGUMENT

- I By enacting 23 U.S.C. §409, Congress has sought to recognize important state functions by preserving common law tort claims against railroads for injuries and deaths attributable to collisions at public grade crossings.

The right of an aggrieved party to seek compensation for another's negligence is fundamental to our system of justice. Deeply embedded in the fabric of state sovereignty, the ability of state courts to determine liability and award damages represents an important exercise of a state's primary and historic police powers to promote the health and safety of its citizens. The development of a consistent body of tort common law is central to the ability of states to shape and influence desirable behavior. With thousands of public grade crossings across the country only passively protected by standard crossbuck signage, tort claims complement the efforts of state regulators who are required to tackle this widespread safety problem with limited administrative and financial resources. Congress has expressly recognized this important state function with the enactment of 23 U.S.C. §409:

Notwithstanding any other provisions of law, reports, surveys, schedules, lists, or data compiled for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be admitted into evidence in Federal or State court or considered for other purposes in any action for damages arising from any

occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

(Emphasis added).

The Court need not look beyond the express words of 23 U.S.C. §409 to conclude that the Railroad's preemption arguments are without merit. Enacted in 1987, that statute limits the admissibility or other use of information that is collected and used as part of state-administered federally-funded safety programs for railroad grade crossings. The purpose of this statute is to encourage a free flow of information among railroads, local governmental authorities, and state regulators charged with administering these funded safety programs. This goal is furthered, according to the plain statutory language, by limiting the use of such information in *any action for damages arising from any occurrence* at any crossing referenced in the information. Clearly, Congress contemplated the continued right of the public to bring negligence claims against railroads arising from grade crossing collisions, as evidenced by these plain words. Just as clear is the congressional determination that the provisions of Section 409 are intended to control over "any other provisions of law."

In 1991, Congress enacted the Intermodal Surface Transportation Efficiency Act of 1991, amending Section 409 to preclude the *discovery* of such information. 23 U.S.C. §409 (as amended Pub. L. 102-240, Title I, §1035(a), Dec. 18, 1991, 105 Stat. 1978). However, the "in any action for damages" language remained *intact and unchanged* from the 1987 enactment. Once again, Congress had the opportunity and declined to expressly preempt or preclude state tort actions predicated upon a railroad's duty to provide safe grade crossings. Had Congress done so, the discovery and admissibility preclusions set forth in 23 U.S.C. §409 would be redundant and simply unnecessary. A fundamental principle of statutory construction is that "Congress cannot be supposed to

have intended a vain thing." *Heydenfeldt v. Daney Gold and Silver Mining Co.*, 93 U.S. 634, 639 (1877); accord *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625-626 (1978) (holding that when Congress speaks "directly to a question, the Court is not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless.")

Congress is further presumed to be knowledgeable about existing law pertinent to the legislation that it enacts. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-185 (1988), citing *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 319-320 (1983). Congress must therefore be presumed to have been aware of state tort suits against railroads for injuries and deaths resulting from grade crossing collisions, both when it enacted 23 U.S.C. §409 in 1987, and more recently when it amended that statute. Nevertheless, Congress has refused to alter or amend the language of that statute to preclude "actions for damages arising from occurrences" at railroad grade crossings. Had Congress determined that a proliferation of state tort suits was inconsistent with or "disruptive" to the federal regulatory scheme, as CSX argues, it could easily have expressed its preemptive intentions. Instead, Congress has knowingly declined to express any such intention.

Indeed, Congress has demonstrated its ability to use very explicit language to express its intent to preempt or not to preempt state common law. See, e.g., 12 U.S.C. §§1715z-17(d) and 1715z-18(e) (certain insured mortgages not subject to specified common law limitations); 17 U.S.C. §301(c) (no preemption of common law with respect to sound recording copyrights for specified time); 29 U.S.C. §653(b)(4) (workman's compensation common law not preempted); 29 U.S.C. §1144(a), (c)(1) (preempting common law regarding employee benefit plans). Congress' careful selection of the words "in any action for damages" in 23 U.S.C. §409 expresses a clear intention that state tort actions, arising from grade crossing collisions, are not to be preempted by federal statutes or regulations that address railroad safety

matters. To hold otherwise would ignore the clear and unambiguous language of the federal statute, and effectively render the statutory text meaningless and unnecessary.

The Court should be reluctant to disturb the central function of state court systems in shaping and promoting responsible industry conduct, particularly where, as here, the scope of the safety problem is pervasive and public lives are daily at stake. The congressional intent espoused in 23 U.S.C. §409 is unambiguous and unmistakable. Congress has mandated that important state policies, furthered by the regulatory and compensatory functions of state tort actions, are to be preserved from federal preemption. The Court should refuse to expand federal power in a way that unnecessarily encroaches upon vital state interests, and is contrary to the express language of 23 U.S.C. §409.

II. Federal statutes and regulations that address railroad safety do not constitute a clear and manifest congressional intent to preempt state tort actions against railroads for failure to provide safe public grade crossings.

Preemption is fundamentally a question of congressional intent. *English v. General Elec. Co.*, ___ U.S. ___, ___ 110 S. Ct. 2270, 2275 (1990); *Schneidwind v. ANR Pipeline Co.*, 485 U.S. 293, 299 (1988). In analyzing preemption questions, the exercise of federal supremacy is not to be lightly presumed. *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 139 (1973). The Court's preemption analysis must be guided by an abiding respect for the delicate federal-state balance of power preserved in our federalist system. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981) (citations omitted); see also, *California v. Federal Energy Regulatory Commission*, ___ U.S. ___, ___ 110 S. Ct. 2024, 2029 (1990) (citations omitted). Congress may preempt through use of express statutory language, or impliedly by pervasively occupying a regulatory area to the exclusion of state

regulation. Preemption of state law has also been found where state law conflicts with federal law such that compliance with both cannot be achieved, or where state law stands as an obstacle to accomplishment of Congress' purposes and objectives. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

The Court has previously recognized that traditional principles of state tort law apply with full force absent a clear and manifest congressional intent that such principles be supplanted. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-186 (1988) (affirming Ohio Supreme Court decision upholding increased workers' compensation award for injuries arising from a safety violation at federal government facility in the face of a preemption challenge under the federal Atomic Energy Act); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984). Where, as here, the field that Congress is said to have preempted includes areas traditionally regulated by the states, congressional intent to supersede state laws must be clear and manifest. *English*, ___ U.S. ___, ___ 110 S. Ct. 2270, 2275. The presumption against federal preemption is especially strong where safety is involved and the state's residents would otherwise be left unprotected while they await federal action. *Maurer v. Hamilton*, 309 U.S. 598, 614 (1940); *Kelly v. Washington*, 302 U.S. 1, 10-14 (1937). The Court has noted the particular vitality of this presumption where preemption of state remedies is sought and Congress has failed to provide any specific federal remedy or recourse for those injured by wrongful misconduct. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984).

Federal legislation has traditionally established a floor of safe conduct and, before transforming such legislation into a ceiling on states' authority to protect their citizens, courts should discern a clear statement of congressional intent to supplant state law. *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529, 1548 (C.A. D.C. 1984), cert. denied, 469 U.S. 1062 (1984), citing *United States v. Bass*, 404 U.S. 336, 349-350 (1971); see also, *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290,

302-304 (1976). To overcome the strong presumption against preemption required to prevail in this case, CSX must establish a clear and manifest congressional intention to preempt state common law tort actions. *Metropolitan Life Insur. Co. v. Massachusetts*, 471 U.S. 724, 748-752 (1985).

The amici submit that the text and legislative history of the federal statutes relied upon by the Railroad, particularly when construed in light of the express language of 23 U.S.C. §409, are wholly inadequate to demonstrate the requisite clear and manifest congressional intent to preempt common law tort actions against railroads for failure to provide safe grade crossings. The Railroad's arguments misapply the intended scope of the FRSA, the Federal Highway Safety Act (FHSA), and related federal regulations, in an overly broad fashion that lacks support either in the statutory language or the legislative history. The issue of a railroad's duty to provide a safe grade crossing involves a uniquely "localized" determination, not embodied in any uniform national regulation or standard promulgated by the Secretary of Transportation. The equation for improving safety at public grade crossings requires a joint effort by state regulators, the railroads, and the public. Removing the railroads, and their vast expertise and resources from this equation, as CSX would have the Court do, will seriously hamper achievement of this important safety goal and leave innocent victims, or those representing their estates, with no compensatory recourse whatsoever.

- A. FRSA Section 434 and accompanying legislative history do not express a clear and manifest congressional intent to preempt state common law tort actions against railroads.

The FRSA was enacted with the stated purpose of improving safety in all areas of railroad operations to reduce injuries and deaths. 45 U.S.C. §421. Improvement of safety at public grade crossings was

an important focus of the FRSA. 45 U.S.C. §433. Although Congress sought uniformity in railroad safety regulation, Congress clearly envisioned toleration of state regulation where appropriate:

The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. *A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement.* A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to *eliminate or reduce an essentially local safety hazard*, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

45 U.S.C. §434. (Emphasis added).

With the enactment of the FRSA, Congress sought to advance railroad safety under a uniform approach *to the extent practicable.* The express language of Section 434 embodies a congressional recognition of the need for practical limitations upon total and absolute federal regulation of such an inherently dangerous industry with so pervasive a presence across the United States. This is particularly true with regard to grade crossing safety, where the dangers posed by a particular grade crossing are attributable to localized characteristics and conditions.

The Court's preemption analysis in this case must be grounded upon a narrow construction of FRSA Section 434, in light of the strong presumption against preemption of areas traditionally left to the

states' regulatory police powers. *English v. General Electric Co.*, ___ U.S. ___, 110 S. Ct. 2270, 2275 (1990); *Jones v. Rath Packing Co.*, 431 U.S. 519, 525 (1977) (citations omitted). The statutory language of Section 434 does not expressly preempt state tort claims against railroads for failure to provide safe grade crossings. Indeed, FRSA Section 434 unequivocally authorizes state regulation to promote railroad safety *until* the Secretary adopts a rule or standard covering the subject matter covered by the state regulation. By this express language, Congress intended to defer preemption of state regulation *until* the Secretary has addressed the same subject matter.

The Court recently decided the case of *Cipollone v. Liggett Group, Inc.*, ___ U.S. ___, 112 S. Ct. 2608 (1992) which is instructive on the issue of federal preemption of state common law. In *Cipollone*, the Court was required to ascertain whether the federal Cigarette Labeling and Advertising Act, codified at 15 U.S.C. §1331, *et seq.* (FCLAA), precluded claims against cigarette manufacturers based on a number of common law theories.

In analyzing the preemption issue, the Court found it unnecessary to go beyond the express preemptive language contained in the FCLAA:

(a) No *statement* relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.

(b) No *requirement or prohibition* based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

15 U.S.C. §1334. (Emphasis added).

The Court in *Cipollone*, as it has consistently done, noted the appropriateness of narrowly construing the FCLAA preemption language in light of the strong presumption against preemption of state regulation of health and safety. *Cipollone*, 112 S. Ct. at 2618. In refusing to preempt tort claims that did not fall squarely within the express FCLAA preemptive language, the Court framed the proper inquiry as whether the legal duty serving as the predicate of the common law claim falls within the precise preemptive language, so as to be precluded. *Cipollone*, 112 S. Ct. at 2621. The Court in *Cipollone* found preemption only of tort claims based upon state requirements regarding cigarette advertising and labeling, matters for which state regulation is *expressly precluded* under the FCLAA. 15 U.S.C. §1334.

In the case at bar, amici submit that a narrow, yet proper application of the FRSA preemption provision does not evince a clear and manifest intent to preempt state common law actions for injuries and fatalities at public grade crossings. FRSA Section 434 does not expressly preempt or preclude state tort claims against railroads for failure to provide grade crossings that are safe for public passage. Instead, the FRSA preemption provision, unlike that found in the FCLAA, contains a *broad reservation* of authority to the states *until* the federal government "covers" the particular subject matter by rule, regulation, order or standard. Congress has appropriately recognized the necessity for practical limitations upon exclusive federal safety regulation of an industry so dangerous and so widespread as the railroad industry. No federal statute, within the FRSA statutory scheme, nor any regulation, or other standard promulgated thereunder, covers the subject of a railroad's *duty*, the focus of state tort law, to install active warning devices to minimize crossing collisions.² Hence, the "predicate" of common law

² 45 U.S.C. §433 directs the Secretary to submit a study and recommendations to the President addressing the problem of elimination and protection of railroad grade crossings. Pursuant to this directive, the Secretary has

tort actions does not fall within the preemptive language found in FRSA Section 434, as required under *Cipollone* to effect federal preemption of state tort claims.

The Secretary has demonstrated an ability to adopt regulations and standards for specific areas of railroad safety, pursuant to authority granted under the FRSA. See, e.g. 49 C.F.R. §213 (track safety standards); 49 C.F.R. §215 (freight car safety standards); 45 U.S.C. §221 (train end marking devices); 49 C.F.R. §223 (safety glazing standards for locomotives, passenger cars and cabooses); 49 C.F.R. §229 (locomotive safety standards). Conspicuously absent is any federal regulation regarding the need for traffic control gates and flashing lights at railroad grade crossings, or any federal mechanism to provide compensation for deaths or injuries resulting from grade crossing collisions. The express language of the FRSA preemptive provision reflects a congressional belief that such matters would most effectively be addressed by state regulation due to the "localized" analysis required. 45 U.S.C. §434.

Congress' refusal to enact a national uniform regulation, addressing the need for grade crossing safety devices, is not surprising. The need for active warning devices requires a "localized" determination based upon consideration of many factors that differ greatly from crossing to crossing. The level of danger and likelihood of resulting accidents, and the corresponding duty of a railroad to exercise ordinary care, will vary depending upon factors that are unique to each grade crossing. The duty to install active warning devices is clearly best left to state courts to ascertain whether the railroad acted in a responsible manner commensurate with the circumstances presented by a particular grade crossing. The

established regulations governing reporting of accidents and warning signal failures at grade crossings, 49 C.F.R. §234, but, to date, no regulations addressing a railroad's duty to install active warning devices at grade crossings have been adopted by the Secretary.

continued ability of state courts to perform this analysis, and to assess liability and award damages, serves an important regulatory function not embodied in any federal regulations or standards.

Congress may have ultimately envisioned uniformity and comprehensiveness of federal regulation of railroad safety matters. That congressional intention, however, does not support the preemption of matters *not yet the subject of* federal regulation. The legislative history of the FRSA noted the magnitude of the safety problem with which Congress was attempting to grapple, and the importance of a federal-state partnership approach to improving railroad safety:

... For all classes of persons, including highway-grade-crossing casualties, passengers, and trespassers there were 2,299 killed and 23,356 injured in train accidents during the past year. We cannot afford the continuation of these losses....

... Grade crossing accidents rank as the major cause of fatalities in railroad operations. They account for 65 percent of the fatalities resulting from all types of railroad accidents, and rank second only to aviation mishaps in severity. Annually, about 4,000 accidents produce approximately 1,600 deaths, which is also a matter of major public concern....

H.R. Rep. No. 91-1194, 91st Cong., 2nd Sess. 11, reprinted in 1970 U.S. Code Cong. & Admin. News 4104, 4106, 4126. See, also, H.R. Rep. No. 93-118, 93rd Cong., 1st Sess., reprinted in 1973 U.S. Code Cong. & Admin. News 1859, 1892-93.

The legislative history further reveals a congressional belief that state regulation, in whatever form, would serve an important complementary function to federal regulation to *avoid regulatory gaps*.

For example, Congress considered the testimony of then Secretary of Transportation, John Volpe:

To avoid a lapse in regulation, Federal or State, after a Federal safety bill has been passed, section 105 provides that the states may adopt or continue in force any law, rule, regulation or standard relating to railroad safety until the Secretary has promulgated a specific rule, regulation or standard covering the subject matter of the state requirement. This prevents the mere enacting of a broad authorizing Federal statute from preempting the field and making void the specific rules and regulations of the states. Therefore, until the Secretary has promulgated his own specific rules and regulations in these areas, state requirements will remain in effect.

Federal Railroad Safety and Hazardous Materials Control Act: Hearings before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 91st Cong., 2d Sess. 51 (1970) (written statement of John Volpe, Secretary of Transportation). (Emphasis added).

• The legislative history of the FRSA evinces a grave congressional concern for the staggering number of injuries and deaths resulting from grade crossing collisions. Congressional deliberations preceding enactment of the FRSA express no intention to preempt common law remedies, but rather express an intention to preserve state regulation of railroad safety matters *until* the Secretary adopts a *specific* rule, regulation, or standard covering the same subject. The Secretary has promulgated no regulation, rule or standard covering a railroad's duty to install active warning devices at grade crossings. The arguments advanced by CSX, if adopted, will create the very regulatory vacuum that Congress sought to avoid, by *sanctioning railroad inaction*, even in the face of known dangers, until state regulators

direct the Railroad to install active warning devices at a particular crossing.

While the legislative history of the FRSA considered, at some length, the interrelationship between the federal government and the states in promoting grade crossing safety, nowhere does that history express a congressional intention to preempt state tort actions and remedies against railroads. Minimal congressional debate or discussion, or mere silence, is insufficient to overcome the strong fundamental presumption against federal preemption of state law. *Wisconsin Public Intervenor v. Mortier*, ___ U.S. ___, 111 S. Ct. 2476, 2483 (1991) (citation omitted).

The Railroad possesses the best information regarding dangerous conditions at grade crossings under its supervision and control. The Railroad's vast knowledge and resources are critical to effective efforts to improve public safety at public grade crossings. CSX should be made to actively utilize its resources in a responsible fashion that seeks to maximize safety for both its employees and the travelling public. Railroads must be proactive, not reactive, where lives are daily at stake.

The FRSA underwent significant amendment in 1988 with the enactment of the Rail Safety Improvement Act of 1988, codified at 45 U.S.C. §431. Congress once again declined to adopt any uniform rule or standard governing the need for active warning devices at crossing locations. Senate Report No. 100-153, 100th Congress, 2d Sess. 4, reported in 1988 U.S. Code Cong. & Admin. News 716-717. In fact, the legislative history addressed a host of matters largely unrelated to grade crossing safety. *Id.* at 696-698. Although Congress broadened the Secretary's authority to impose civil penalties upon individuals for federal safety violations, nowhere did Congress discuss precluding or abridging state court damage awards against negligent railroads. *Id.* at 710. Given the absence of a comparable federal tort scheme, 45 U.S.C. §434 expressly preserves state common law tort

actions and damage awards against railroads for their negligent failure to provide safe grade crossings.

It is remarkable, to say the least, to suppose that Congress intended something as significant as preemption of an entire body of state common law, and abolition of all rights and remedies afforded thereunder, without some specific mention in the statute or legislative history of a clear intention to do so. All that can be fairly gleaned from the FRSA legislative history is a sobering congressional awareness of the national scope and severity of the grade crossing safety problem, and a desire for the federal government and the states to undertake a coordinated effort to study the problem and develop solutions.

The focus of state tort law is much different than that of state regulators charged with allocating limited federal dollars for installation of warning devices at grade crossings. The purpose of tort law is to establish and impose liability for negligent acts. State tort law frequently focuses upon whether specific facts and circumstances dictate a *need* for and a duty to provide protection above that required by statute, typically crossbuck signage, at a particular crossing. Common law tort actions bear no connection with or relationship to systematic state programs that allocate federal funds for safety devices at railroad grade crossings, from which any preemptive intent may be discerned. *Morales v. Trans World Airlines, Inc.*, ___ U.S. ___, 112 S. Ct. 2031, 2037 (1992). Nor does recognition of state tort claims frustrate or conflict with important federal goals, since both common law tort actions and the federal regulatory scheme work to accomplish safer, more responsible behavior by railroads. There is simply no conflict between FRSA safety requirements, that address a host of non-related matters, and state common law, that imposes a duty of reasonable care upon railroads, from which the Court can discern a clear and manifest congressional preemptive intent. The potential for significant tort liability exposure creates dynamic incentives for railroads to actively undertake measures to provide

maximum safety at public grade crossings, consistent with the stated objectives of the FRSA.

The Railroad has failed to demonstrate a clear and manifest congressional intention, indeed, any congressional intent at all, to preempt state common law tort claims and thereby immunize railroads from liability for accidents at public grade crossings that they maintain and control. The compensatory and regulatory ends served by state common law actions have not been shown to be incompatible or inconsistent with federal regulatory aims espoused in the FRSA and its accompanying legislative history. The Court should affirm the decision below, and preserve, for state courts, the determination of whether CSX met its well-established common law duty to exercise ordinary care under the facts of the case below.

- B. Federal regulations promulgated under the Federal Highway Safety Act do not address a railroad's duty to provide active warning equipment at public grade crossings and, therefore, have no preemptive effect upon tort actions that establish such a duty.

CSX also misconstrues the purpose and scope of federal highway safety regulations promulgated under the FHSA. Although the Secretary has adopted specific regulations covering many areas of railroad safety, the Secretary has not promulgated any regulations under the FRSA or the FHSA that address the Railroad's duty to install active warning devices at public grade crossings. When preemption by regulation is considered, courts should be reluctant to preempt state law absent a very clear and specific intent, since agencies normally address problems in a detailed manner. *Hillsborough County, Fla. v. Automated Med. Labs*, 471 U.S. 707, 718 (1985).

The FHSA statutory scheme contains no express preemptive provision. The stated purpose of regulations adopted under the FHSA is to advance

federal aid projects at railroad facilities. 23 C.F.R. §646.200(a). The FHSA directs the Secretary to assist the states in the development of highway safety programs that meet applicable federal regulations and enable the states to qualify for federal funding. 23 U.S.C. §§401, 402; 23 U.S.C. §130. In furtherance of this goal, the Secretary has promulgated regulations regarding sources of federal funding, types of projects, classification of projects for receipt of federal dollars, and design of grade crossing improvements. 23 C.F.R. §§646.206-646.214. These regulations largely eliminate any contribution by railroads toward the cost of installing active warning devices where federal funds are used. 23 C.F.R. §646.210(a).

Federal highway aid regulations establish the Manual on Uniform Traffic Control Devices (MUTCD) as the national standard for warning devices at public grade crossings, and require states to develop programs³ adopting the MUTCD as a condition to qualify for federal highway aid for grade crossing safety improvements. 23 C.F.R. §655.601; 23 C.F.R. §646.214(b).⁴ Nowhere, however, does this body of regulations evince any hint of a congressional intention to preempt state common law tort actions. The Secretary has, however, clearly demonstrated his ability to preempt other types of state laws, within

³ For example, Ohio has implemented a safety warning program that identifies public grade crossings as candidates for federally-funded safety equipment installations. Selection of those crossings where limited federal funds will be allocated is made by a diagnostic team, that includes railroad representatives, subject to approval by state regulators. Warning devices installed with federal funds comply with MUTCD requirements.

⁴ 23 C.F.R. § 646.214(b) addresses the types of safety devices to be utilized at grade crossings that are improved with federal funds. By its own terms, this regulation applies only to *federally-funded* projects. The Cook Street grade crossing, at issue below, was not improved with federal highway aid funds.

these same regulations, where the Secretary has intended such a result:

State laws requiring railroads to share in the cost of work for the elimination of hazards at railroad-highway crossings shall not apply to Federal-aid projects.

23 C.F.R. §646.210(a). (Emphasis added).

CSX asserts that the MUTCD, in particular Part VIII, vests sole responsibility for initiating and selecting crossing safety improvements in state agencies. The language of Section 8A-1 of the manual belies these assertions, as it expressly contemplates "joint responsibility in the traffic control function between the public agency and the railroad." Although the manual vests final authority in the public agency to determine and select the traffic control devices to be used, it is illogical to interpret that language as a federal directive that railroads are henceforth relieved of all duties and responsibilities to provide safe grade crossings. Such a result would clearly ignore the express language of the MUTCD directing that railroads shall play a prominent role in safe traffic control at public grade crossings. The manual provisions do not abolish or alter a railroad's longstanding common law duty to provide safe public grade crossings under its supervision and control.⁵

⁵ Reasonably, the prospect of significant tort liability should induce railroads to develop their own plans for monitoring and improving grade crossing safety, a result entirely consistent with the stated goals of the FRSA to promote safety and reduce injuries and deaths. 45 U.S.C. §421. Federal interests in promoting uniformity and comprehensive state planning are fully protected by requiring private initiatives to be reviewed and approved by the appropriate state regulatory agency before installation of crossing improvements. Requiring public approval of grade crossing safety improvements does not conflict with the common law duty imposed upon railroads to initiate steps to seek that approval in the face of known dangers.

Regulations promulgated by the Secretary under the FHSA, including the MUTCD, are largely designed to establish funding sources and criteria for states to adopt to qualify for federal highway aid for crossing safety improvements. Federal regulations adopted under the FHSA are intended to accomplish the flow of federal highway dollars to the states for qualifying grade crossing safety improvements, and not, as the Railroad argues, to preempt state tort actions. Nowhere does the MUTCD generally specify when particular safety devices are required. The MUTCD addresses types of acceptable warning devices, their design and placement at crossing locations. States' efforts to develop programs that comply with federal regulations are both laudable and understandable. It is ludicrous to suggest that states are required to relinquish vitally important police powers as a condition to participating in federally-funded programs for grade crossing safety improvements. Such a result, amici submit, is inconsistent with the law and certainly with the development of sound public and regulatory policy. Congress has not seen fit to impose such conditions upon the states, nor should the Court.

Nor are common law tort actions disruptive to the federal highway regulatory scheme. The common law focuses upon a railroad's duty and responsibility to provide grade crossings that are safe for public passage, and not upon types, design, engineering and placement of crossing safety devices which are matters addressed by the MUTCD. The distinctive and non-conflicting ends sought to be achieved by common law duties and federal regulations addressing grade crossing safety were clearly delineated in the well-reasoned decision issued by the appellate court below:

... 23 U.S.C.A. §130(d) (1990) ... does not explicitly or implicitly pre-empt any state laws except perhaps any laws dealing with surveying and prioritizing projects ... this section contains no explicit provisions pre-empting contrary or similar state law.

Second, we are unable to imply pre-emption because this statute is not such a pervasive set of regulations that we could fairly imply a congressional intent to pre-empt the field ... Finally, we are unable to find any actual conflict between the state and federal law. *Allowing tort suits to go forward against railroad companies simply does not affect (or at best it only tangentially affects) the provision of federal aid to the states to help them build better railroad grade crossings.*

Easterwood v. CSX Transportation, Inc., 933 F.2d 1548 (11th Cir. 1991), cert. granted, 60 U.S.L.W. 386 (1992). (Emphasis added). The *Easterwood* court characterized federal highway aid statutes as creating an invitation to the states to qualify for federal aid by complying with specified federal regulations. In so noting, the court below properly found that the federal highway regulatory scheme neither expresses nor implies any congressional intention to preempt common law tort actions for failure to provide adequate warning devices at public grade crossings. Such an intent simply does not exist.

If there exists any tension between the federal railroad safety regulatory scheme and the availability of state common law tort claims in the instant case, and amici submit that the two coexist harmoniously, it is a tension that Congress has expressed its willingness to tolerate. See *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984).

CONCLUSION

The Eleventh Circuit Court of Appeals properly held that federal statutes and regulations do not preempt state tort actions against railroads for their negligent failure to provide safe public grade crossings. The Court should hold that the FRSA and FHSA, and regulations promulgated thereunder, do not preempt state common law tort remedies against railroads for failure to provide adequate warning protection at public grade crossings.

Respectfully
submitted,

LEE FISHER
Attorney General
State of Ohio

NANCY J. MILLER
Deputy Chief Counsel
Ohio Attorney
General's Office
30 East Broad Street,
17th Floor
Columbus, OH 43215
(614) 466-5026